Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

91 1088
No. 91-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CLARENCE M. ADKINS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

EDGAR N. JAMES *
MARK MASLING
GUERRIERI, EDMOND & JAMES
1331 F Street, N.W.
Fourth Floor
Washington, D.C. 20004
(202) 624-7400

ROBERT H. STROPP, JR.
JUDITH A. SCOTT
UNITED MINE WORKERS OF AMERICA
900 15th Street, N.W.
Washington, D.C. 20005
(202) 842-7330

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Fed. R. App. P. (3)(C) provides that a "notice of appeal shall specify the party or parties taking the appeal." This case presents the question, which has split certain circuits, whether Appellate Rule 3(c) is satisfied by a notice of appeal that states, under a short-form caption, that the appeal is being taken by "all of the plaintiffs" but which does not identify any particular appellant.

PARTIES TO THIS PROCEEDING

Petitioner United Mine Workers of America is an international labor organization with affiliated labor organizations as defined in 29 U.S.C. § 402(j). Respondents are approximately 300 former mine workers residing in or near Kentucky.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THIS PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
FEDERAL RULE INVOLVED	2
STATEMENT OF THE CASE	2, 4
REASONS FOR GRANTING THE WRIT	5, 9
I. TO RESOLVE A CIRCUIT SPLIT	5, 8
II. TO PREVENT FURTHER CONFUSION AND WASTE OF JUDICIAL AND LITIGANT RESOURCES	8, 9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

	Page
Adkins v. UMWA, 941 F.2d 392 (6th Cir. 1991)	1, 5
Adkins v. UMWA, 19 Fed. R. Serv. 3d 848 (6th Cir. 1991) (superceded by 941 F.2d 392)	1, 4
Adkins v. UMWA, No. 88-281 (E.D. Ky., Feb. 8, 1990)	3
Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990)	6
Ford v. Nicks, 866 F.2d 865, 869-70 (6th Cir.), *reh'g denied*, (6th Cir. 1989), *overruled, Minority Employees*, 901 F.2d at 1330 (en banc)	9
Minority Employees of Tennessee Department of Employee Security, Inc. v. State of Tennessee, 901 F.2d 1327 (6th Cir.), *cert. denied*, 111 S. Ct. 210 (1990)	4, 9
National Center for Immigrants' Rights v. I.N.S., 892 F.2d 814 (9th Cir. 1989)	9
Santos-Martinez v. Soto-Santiago, 863 F.2d 174 (1st Cir. 1988)	5, 6
Storage Technology Corp. v. U.S. District Court for the District of Colorado, 934 F.2d 244 (10th Cir. 1991)	5, 6, 7
Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988)	4, 7, 8
Zamora v. Hart, 883 F.2d 1025 (9th Cir. 1989), *modified*, 902 F.2d 42 (9th Cir. 1990)	9

STATUTES

28 U.S.C. § 1254(1) (1988)	2
Fed. R. Civ. P. 3 (c)	2, 8
Labor Management Relations Act, 29 U.S.C. § 185	2
29 U.S.C. § 402(j)	ii

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CLARENCE M. ADKINS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The United Mine Workers of America ("UMWA") hereby petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (App. A) is reported at 941 F.2d 392. The superseded opinion of the court of appeals (App. B) is reported at 19 Fed. Rule Serv. 3d 848 and at 137 L.R.R.M. (BNA) 2527. The opinion of the district court from which the appeal was taken was unpublished (App. C).

JURISDICTION

The amended judgment of the court of appeals was entered on July 18, 1991. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 4, 1991 (App. E). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

FEDERAL RULE INVOLVED

Federal Rule of Appellate Procedure 3(c) provides, in relevant part that:

> The notice of appeal shall specify the party or parties taking the appeal . . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

Respondents brought this action against the UMWA on August 22, 1988, alleging that it had breached a duty of fair representation owed to them, violating § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and also asserting breach of contract claims.[1] All claims arose out of the settlement of litigation between the UMWA and certain coal companies. Plaintiffs' essential complaint was that the UMWA failed to disperse to them any settlement proceeds.

The original complaint listed 307 individuals as plaintiffs. Plaintiffs subsequently filed an amended complaint which seemed to drop six original plaintiffs and which added sixteen new plaintiffs.

On January 31, 1989, the UMWA moved for summary judgment and for a protective order staying discovery until resolution of the summary judgment motion. On

---

[1] The complaint also named certain individuals as defendants who were dismissed from the case by the district court without opposition.

February 23, 1989, the district court directed plaintiffs to point out the specific relevancy of their pending interrogatories to the issues raised in the UMWA's motion for summary judgment. On April 24, 1989, the district court issued a memorandum opinion and order ruling that plaintiffs had not demonstrated that the interrogatories were germane to issues raised in the UMWA's motion for summary judgment. Accordingly, the court granted UMWA's motion to stay discovery pending disposition of the motion for summary judgment. On February 8, 1990, the court granted the UMWA's motion for summary judgment, finding that the union's decision regarding distribution of the settlement proceeds was "clearly related to a legitimate union objective" and therefore did not violate § 301 of the LMRA. *Adkins v. UMWA*, No. 88-281, slip op. at 7 (E.D. Ky., Feb. 8, 1990) (App. C).

On March 8, 1990, plaintiffs filed a timely notice of appeal (App. D) reading in its entirety: [2]

CLARENCE M. ADKINS, *et al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA, *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that all of the Plaintiffs to this action as set out in the Complaint which has been filed herein as well as in all amendments thereto hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Order entering summary judgment on behalf of the Defendants as filed on February 8, 1990 and with

[2] The substance of the appeal was that the district court erred when it awarded the UMWA summary judgment because: (1) it was an abuse of discretion to limit discovery; (2) certain documents before the district court raised material issues of fact; and (3) the district court should not have dismissed plaintiffs' contract claims.

notice being given of the entry of the order on February 8, 1990 in this court.

Relying on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the UMWA moved to dismiss the appeal for failure to satisfy the specificity requirements of Fed. R. App. P. 3(c).[3] On May 30, 1991, a divided panel of the Sixth Circuit denied the UMWA's motion,[4] holding that "[t]he notice of appeal in this case, contrary to the assertions of the dissent, do [sic] give notice that all dissatisfied remaining plaintiffs, adversely affected by the district court's judgment, appeal." *Adkins, supra*, 19 Fed. R. Serv. 3d at 855.

The dissent, citing the Sixth Circuit's *en banc* decision in *Minority Employees of Tennessee Dept. of Employee Security, Inc. v. State of Tennessee*, 901 F.2d 1327 (6th Cir.) (*en banc*), *cert. denied*, 111 S.Ct. 210 (1990) (holding defective a notice of appeal reading "plaintiffs . . . appeal"), argued that plaintiffs' notice of appeal was jurisdictionally defective, commenting "the panel majority has elevated the redundancy of the word 'all' to a principle of appellate jurisdiction." *Adkins, supra*, 19 Fed. R. Serv. 3d at 859.

---

[3] The UMWA also responded to the merits of plaintiffs' appeal arguing that the district court's decision was correct because: (1) the district court had broad authority to regulate discovery and that plaintiffs failed to articulate why their requests were relevant; (2) plaintiffs adduced no evidence regarding their claim that the settlement proceeds were distributed in a way unrelated to a legitimate union objective; and (3) if the district court correctly dismissed plaintiff's § 301 LMRA claim, it had properly exercised its discretion to dismiss plaintiff's state law claims.

[4] The divided panel also reversed the district court's summary judgment award, holding that the court below erred in limiting discovery and that at least seven of the approximately 300 plaintiffs had raised material issues of fact. The court ignored the other appellants.

On June 11, 1991, the UMWA filed a petition for rehearing and suggestion for hearing *en banc*, citing cases from the First and Tenth Circuits which held that notices of appeal referencing "all" plaintiffs or defendants—identical in form and substance to the notice of appeal filed by plaintiffs here—were jurisdictionally defective. *See Storage Technology Corp. v. U.S. Dist. Court for the Dist. of Colorado*, 934 F.2d 244 (10th Cir. 1991); *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988). In apparent response, the Sixth Circuit panel issued an amended opinion on July 18, 1991 (App. A), in which it discussed but rejected the reasoning of those cases. *See Adkins, supra*, 941 F.2d at 398.

On October 4, 1991, the Sixth Circuit denied the UMWA's petition for rehearing and suggestion for rehearing *en banc*. (App. D.)

REASONS FOR GRANTING THE WRIT

I. TO RESOLVE A CIRCUIT SPLIT.

The Sixth Circuit's jurisdictional ruling directly conflicts with decisions in two other circuits. On an identical notice of appeal, the First and Tenth Circuits would have dismissed the appeal at least as to all plaintiffs other than the one named in the caption of the notice of appeal. *See Storage Technology Corp. v. U.S. Dist. Court for the Dist. of Colorado*, 934 F.2d 244 (10th Cir. 1991); *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988). This Court should grant certiorari in order to resolve this conflict and clarify the specificity requirements of Fed. R. App. P. 3(c). On a question of such basic and everyday importance as the required contents of a notice of appeal, a clear and uniform rule is essential.

The split in these circuits is glaringly apparent when one compares the notice of appeal in this case with the notices in *Storage Technology Corp. v. U.S. Dist. Court for the Dist. of Colorado*, 934 F.2d 244 (10th Cir. 1991);

Santos-Martinez v. Soto-Santiago, 863 F.2d 174 (1st Cir. 1988); and *Baylis v. Marriott Corp.*, 906 F.2d 874 (2d Cir. 1990). The relevant sections of the body of notice of appeal in these cases are as follows:

UMWA

> Notice is hereby given that all of the Plaintiffs . . . hereby appeal . . .

Storage Technology

> Comite Pro Rescate de la Salud, *et al.*, and all the Defendants of record herein, appeal . . .

Santos-Santiago

> All Plaintiffs appeal . . .

Baylis

> all of the plaintiffs . . . hereby appeal

The body of all four notices use the word "all" plus the plural form of "defendant" or "plaintiff" to designate the appealing parties. Nowhere in the body of the notice did the name of all parties appealing appear. Moreover, the captions of all four notices name only one plaintiff or defendant, followed by *et al.*

Despite these similarities, these courts reached distinctly different results. The Sixth Circuit held that the notice of appeal was effective for each and every plaintiff. The Tenth Circuit held that the notice of appeal was effective only for the defendant explicitly named in the caption and body of the notice of appeal. *Storage Technology*, *supra*, 934 F.2d at 248. The First Circuit held that the notice of appeal was effective for none of the plaintiffs. *Santos-Martinez*, *supra*, 863 F.2d at 176. The Second Circuit held that the notice of appeal was effective for every plaintiff.

In addition to resolving this circuit split, review of the decision below is also warranted because the courts of appeals fundamentally disagree on how *Torres* should be implemented. *Torres* held that to confer jurisdiction a notice of appeal must give "fair notice of the specific individual or entity seeking to appeal." 487 U.S. at 318. The Court ruled, in particular, that "use of the phrase '*et al.*,' which literally means 'and others,' utterly fails to provide such notice." *Id.* In short, "vague designation[s]" are insufficient. *Id.*

Nevertheless, certain circuits, including the court below, continue to allow the use of vague generic descriptions in notices of appeal. In addition, the circuits are split on whether an appellate court may look to the caption of the notice to resolve ambiguity. This case affords an opportunity to resolve these matters once and for all. Clarification will assist practitioners, ensure fairness and uniformity of result, and conserve judicial resources.

If courts accept notices of appeal using vague designations and generic phrases such as "defendants," "the defendants," or "all defendants," this objective will not be met. Generic phrasing can be particularly problematic in a complex case involving many parties, some of whom may have been joined, substituted or dismissed subsequent to the filing of the original complaint. *See, e.g., Storage Technology Corp. v. United States Dist. Court for the Dist. of Colorado*, 934 F.2d 244, 248 (10th Cir. 1991).

As noted by the dissenting member of the panel below, this case is a perfect example of the inadequacy of generic phrasing in a notice of appeal. The original complaint referenced 307 plaintiffs. An amended complaint seemed to drop six plaintiffs but added sixteen new names. Yet the notice of appeal read in part, "all of the Plaintiffs to this action as set out in the Complaint . . . as well as in all amendments thereto hereby appeal. . . ."

Even though it is difficult, if not impossible, to know who does and who does not appeal from the district court's order, the court below held that the notice of appeal met the requirements of Fed. R. Civ. P. 3(c).

In the present case, neither the body of the notice read alone, nor the body read together with the caption provide the certitude required by *Torres*. Confirming the insufficiency of the plaintiffs' notice would clarify *Torres* and standardize the circuits' divergent treatment of generic phrases [5] and captions.[6]

II. TO PREVENT FURTHER CONFUSION AND WASTE OF JUDICIAL AND LITIGANT RESOURCES.

Since *Torres*, there has been an unproductive explosion of appellate litigation over the specificity requirement of Fed. R. App. P. 3(c), where the adequacy of notices of appeal has been an issue in at least 145 reported cases in the courts of appeals.[7] In at least 13 cases, a petition for certiorari has been filed raising a *Torres*-related issue. *See* App. F at VIII. Clarification is needed to prevent the additional wasteful expenditure of judicial and litigant resources on what should be a straight-forward, bright-line jurisdictional rule.[8]

---

[5] *Compare* App. F at III(B) (cases that have allowed the use of generic phrases), *and id.* at III(C) (cases that have allowed the use of modified generic phrases), *with id.* at III(A) (cases that have not allowed the use of generic phrases).

[6] *Compare* App. F at V (cases in which the caption has been consulted), *with id.* at IV (cases in which the court has held that the caption may not be consulted).

[7] This number is based on computer searches for post-*Torres* cases that have construed Rule 3(c)'s specificity requirement. Additional unpublished decisions no doubt exist.

[8] The waste of judicial resources is graphically illustrated by a series of Sixth and Ninth Circuit cases addressing the jurisdictional significance of the definite article "the" in the phrase "the

The circuits are in disarray over this issue. Most circuits insist upon more than the catch-all "*et al.*" as a means of identifying the parties taking an appeal. Some, however, do not, at least if there are only two parties to the appeal, or the named party is a parent and the *al.* refers to his or her children, or the named party is a class representative and the *al.* refers to the other members of the class. *See* App. F at I. Also, if the *al.* is replaced by *ux.*, the notice of appeal is adequate. *Id.* at II. Most circuits also hold that generic phrases such as "the defendants" or, simply, "defendants" do not satisfy Fed. R. App. 3(c). *Id.* at III(A). In the Second and Ninth Circuits, however, phrases like "the defendants" are usually, but not always, sufficient. *Id.* at III(B, C). And some circuits have looked to documents other than the notice of appeal to identify the appellants. *Id.* at VI.

This Court should restore order to this area of the law by granting review in this case and explicitly endorsing the clear-cut reading of Fed. R. App. P. 3(c) that is implied by *Torres*. That reading of the rule best furthers the goals of certainty and predictability. Its endorsement by this Court will ensure that appellate courts and litigants need not continue to waste valuable time and resources addressing the adequacy of notices of appeal.

---

defendants." *See Ford v. Nicks*, 866 F.2d 865, 869-70 (6th Cir.) (phase "the defendants" satisfies Rule 3(c)), *reh'g denied* (6th Cir. 1989), *overruled*, *Minority Employees*, 901 F.2d at 1330 (en banc) (addressing the notice of appeal filed in that case for a *fourth* time); and *Zamora v. Hart*, 883 F.2d 1025 (9th Cir. 1989) (TABLE, TEXT IN WESTLAW) (unlike the phrase "the defendants," phrase "defendants" does not satisfy Rule 3(c)), *modified*, 902 F.2d 42 n.1 (9th Cir. 1990) (TABLE, TEXT IN WESTLAW) (original panel reversed its prior position and held that the phrase "defendants" does satisfy Rule 3(c)) (citing *National Center for Immigrants' Rights v. I.N.S.*, 892 F.2d 814 (9th Cir. 1989)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDGAR N. JAMES *
MARK MASLING
GUERRIERI, EDMOND & JAMES
1331 F Street, N.W.
Fourth Floor
Washington, D.C. 20004
(202) 624-7400

ROBERT H. STROPP, JR.
JUDITH A. SCOTT
UNITED MINE WORKERS OF AMERICA
900 15th Street, N.W.
Washington, D.C. 20005
(202) 842-7330

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5379

CLARENCE M. ADKINS and OTHER NAMED PLAINTIFFS,
Plaintiffs-Appellants,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Kentucky

Decided and Filed July 18, 1991

AMENDED OPINION

Before: KEITH and KRUPANSKY, Circuit Judges; and WELLFORD, Senior Circuit Judge.

WELLFORD, Senior Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. KRUPANSKY, Circuit Judge, (pp. 15-20) delivered a separate dissenting opinion.

WELLFORD, Senior Circuit Judge. Clarence M. Adkins and 306 other miners in Kentucky [1] sued defend-

---

[1] An amended complaint deleted the names of six original plaintiffs and added sixteen individual plaintiffs.

ant Union [2] under § 301 of the Labor Management Relations Act in 1988. The plaintiffs asserted that they were "all former employees of either Leslie Coal Mining Company (Leslie) or McInnes Coal Mining Co. (McInnes)" and members of the defendant Union (UMWA), which was the "exclusive bargaining representative for employees of Leslie and McInnes."

The complaint recited that UMWA had filed suit in 1984 against a number of mining companies, including Leslie, McInnes, Sidney Coal Company (Sidney), and Robert Coal Company (Robert) in the same district court in which the suit at issue was filed, and that the suit was on behalf of "all individual members" of UMWA "adversely affected by alleged breach of contract and conspiracy by defendants in said [1984] complaint." Again, in the complaint at issue, plaintiffs asserted that UMWA obtained a $4,470,000 settlement in the 1984 lawsuit "to be distributed . . . in the sole discretion of the Union." (Sidney was also to set aside coal reserves in and around the McInnes mine as a part of the settlement).

Plaintiffs claimed that UMWA caused the settlement to benefit only 245 of the men "adversely affected by the actions alleged in the lawsuit," and that these favored 245 men received cash, benefits, and hiring privileges through defendant Union's actions while plaintiffs received nothing. Plaintiffs contended that UMWA violated a duty to represent all Union members "without hostility, discrimination, arbitrariness or capriciousness"; in short, a "duty of fair representation," and also that the Union had acted in "bad faith." [3]

---

[2] They also sued Richard Trumpka, President of UMWA, and Cecil E. Roberts, Vice president of UMWA, as well as John J. Banovic, Treasurer of UMWA. The individuals have been dismissed.

[3] The complaint also made reference to a Union constitutional duty of faithful representation in enforcement of collective bargaining rights, and to "meet and assemble freely."

Plaintiffs averred that they were denied the right by the Union and its officers in conspiracy to attend Union meetings and to "assemble freely with other members" in violation of their rights and the Union constitution. The allegations included a claim that the defendant Union's actions "were an attempt to sidestep the collective bargaining agreement," and were done "willfully and/or maliciously." As a consequence, plaintiffs claimed damages, compensatory and punitive, and reimbursement of costs and other relief.

Defendant Union, after institution of discovery by plaintiffs, moved for summary judgment and for a protective order staying discovery pending resolution of the summary judgment motion, claiming that plaintiffs' interrogatories and production requests were "not pertinent to issued raised in the UMWA's dispositive motion" under Fed. R. Civ. P. 26(c).

The basis of defendant Union's "dispositive" motion was that plaintiffs had "no employment relationship . . . and the Union had no collective bargaining relationship . . . with any of these companies [A. T. Massey Coal Company and certain of its subsidiaries]." UMWA claimed in the summary judgment motion that plaintiffs were not "employees" to whom it owed a duty because they "had been laid off for two years prior to the union's dispute with Massey." [1] As a backup position, the Union claimed that it "acted reasonably and entirely consistent with its duty" in the settlement. The latter position seems clearly to put at issue the substance and merits of plaintiffs' basic claim. Affirmatively, as grounds of the Union's motion, it claimed that it "treated the [settlement] money as severance to those persons who had for nearly four years tried to regain an employment opportunity."

---

[1] Neither A. J. Massey Coal Company (Massey) nor any alleged subsidiary company of Massey, as such, was mentioned in the complaint.

Finally, the summary judgment motion asserted failure to exhaust internal Union grievance procedures.

In respect to the third position, it is obviously inconsistent with the UMWA's first position that plaintiffs were owed no duty by the Union. Original defendant Cecil E. Roberts filed an unsworn "declaration" which was attached to the motion for summary judgment that he took responsibility for negotiating a settlement of the UMWA's "labor dispute" with Massey concerning some 19 mines in Kentucky and West Virginia. Roberts declared that UMWA authorized a strike "on October 1, 1984 at a number of Massey locations." Roberts declared that on or about that date he "learned that Massey had bought the Leslie and McInnes" mines, which had been shut down since February 1983. (Robert had purportedly operated Leslie and McInnes, and "had employed UMWA-represented employees").

Roberts' declaration (not to be confused with Robert Coal Company) claimed that when Robert purchased Leslie and McInnes, Massey announced it would operate these "non-union," and that "in response, the UMWA called on the former Robert employees who had previously worked at the Leslie/McInnes Mines to respond to the situation" and "strike against Massey." Roberts further declared, on behalf of the Union for which he served as vice president, that "former Robert employees who responded to the [Union's] call and engaged in the strike" were given strike benefits by UMWA.

Roberts' declaration also stated that "approximately 250 former Robert employees from the Leslie/McInnes Mines joined the strike," and the "other former Robert employees did not." The settlement finally ensued despite dismissal by the district court of Massey and "all the buyers of the Leslie/McInnes Mines." Roberts declared that it was a "Leslie/McInnes settlement" that brought about payment of the four plus million dollars and reopening of the McInnes Mine under a UMWA collective

bargaining agreement and withdrawal of strike activity at the "former Leslie Mine." Roberts decided to pay "245 individuals who still remained in the UMWA Selective Strike Program" in the form of severance "and other benefits." He declared that these 245 "retained their employment connection to the bargaining unit" and that plaintiffs "had left it," adding that plaintiffs were never employed by Massey, "the payor." Finally, Roberts declared that he found no charges by plaintiffs to the Union's International Executive Board about terms of the settlement as required by the Union constitution.

The magistrate, to whom the 1984 lawsuit in the UMWA case was referred, had found "Robert, Leslie, McInnes and Others" in the "Seller Group" of defendants and Sidney and A. J. Massey among the "Buyers Group." He found that Robert, who had signed a UMWA contract, operated Leslie and McInnes before their sale to a Massey subsidiary, Sidney, which refused to assume obligations under the UMWA agreement. (Leslie and McInnes were not "signatories" to the UMWA agreement). The prior UMWA suit involved whether there was substantial continuity between Robert, Leslie and McInnes, and Massey or its subsidiaries. The settlement agreement included UMWA's representation that it had authority to make the settlement "on bahalf of the persons and entities referred to collectively as the Union."

On Jnuary 4, 1989, plaintiffs' counsel, after filing discovery motions, estimated six months to complete discovery after receiving an answer to the original discovery. Within a month, defendant filed its summary judgment motion and motion to limit or postpone discovery. In its motion, UMWA conceded that those asked to join the strike were "former Robert employees who had worked at the mines some twenty-one months earlier," and that "245 former Robert workers joined the strike." The Union claimed that only the latter were entitled to settlement benefits because they "endured the greatest hard-

ship" and "manifested a continuing interest in regaining employment."

In response to the UMWA motion for summary judgment, seven plaintiffs [5] filed an affidavit contending that each was either a Leslie or McInnes employee ("as were all of the other Plaintiffs") and that when laid off, all were UMWA members and remained so "at all relevant times." The affiants claim that they were advised by the local union president that they, and all other plaintiffs, "were being represented by the Union" in its 1984 lawsuit and that they were mailed a copy of a subsequent injunction order in 1985 pertinent to that suit. Affiants claim they did not see or hear Union advertisements about signing up "for the strike fund," but heard about it and "attempted to sign up" unsuccessfully. They claim that they expected to be recalled as part of the settlement because they were (as were other plaintiffs) "ready, willing and able to return to work." Affiants claimed to have called a UMWA official for assistance but were rejected and that both international and local Union officials refused to institute any grievance for them. They claim that after the settlement, the Union would not allow them to attend Union meetings or take part in Union activities pertaining to the settlement. Affiants claim that there is no UMWA constitutional provision providing for a grievance against the Union itself, and that any grievance would be futile in any event.

Unsworn responsive "declarations" to the seven plaintiffs' affidavits were filed by Union agents or officials indicating that Bailey was sent a certified letter in 1985 and that "he worked non-union during the strike"; that Varney transferred into another local union, and he also was sent a 1985 registered letter; that Hensley and Preece obtained fulltime employment; that Hammond worked at a non-union mine; that Case was disabled; and that Jus-

[5] The seven are Hammond, Hensley, Varney, Bailey, Preece, Case, and Justice.

tice "went to work non-union during the strike," and had abandoned the strike and had a suit against UMWA dismissed for failure to exhaust internal union benefits.

The district court, in granting the Union summary judgment, held that although plaintiffs may not have been "employees" in the statutory sense, the Union owed plaintiffs a duty of fair representation. As to this ground of UMWA's motion limiting discovery, plaintiffs then have no complaint. Because plaintiffs were "unable to demonstrate" Union hostility or discriminatory conduct, however, UMWA was granted summary judgment. The district court held that both plaintiffs and the 245 strike settlement beneficiaries to have been "former co-workers," and thus in the same general class or category, and that "plaintiffs failed to respond to the Union's invitation to engage in the picketing," and made further findings on the same undisclosed basis, that some plaintiffs "gained other employment, . . . and some moved to other areas."

The district court made a decision, then, on the merits of plaintiffs' claim of lack of fair representation apparently based on unsworn statements by defendant lawyers and officials. It made no decision on the Union contention of failure to exhaust, or plaintiffs' claimed justification for not pursuing exhaustion further.

JURISDICTION

The timely notice of appeal in this case was as follows:

CLARENCE M. ADKINS, *et al*,
Plaintiffs

v

UNITED MINE WORKERS OF AMERICA, *et al*,
Defendants

NOTICE OF APPEAL

Notice is hereby given that all of the Plaintiffs to this action as set out in the Complaint which has

> been filed herein as well as in all amendments thereto hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Order entering summary judgment on behalf of the Defendants as filed on February 8, 1990 and with notice being given of the entry of the order on February 9, 1990 in this court.

J/A 33.

Defendant moved to dismiss for a jurisdictional defect in this notice based upon use of the words "et al" in the caption rather than listing all of the plaintiffs by name. This issue was recently addressed by this court en banc in *Minority Employees of Tenn. Dep't of Employment Sec., Inc. v. State of Tennesse*, 901 F.2d 1327 (6th Cir. 1990). The Supreme Court also recently has addressed this jurisdictional issue in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). We were almost evenly divided on a somewhat similar issue in *Minority Employees*, and it now behooves us to examine the facts in that case with those in the present case.

Minority Employees involved a first named entity, Minority Employees of the Tennessee Department of Employment Security, Inc. (Minority Employees), and several individual plaintiffs. After an adverse decision in the district court, a notice of appeal was filed designating as the appealing party an "appellant." Nowhere in the caption or body of the notice of appeal in *Minority Employees* was there an indication that more than one appellant, the group, was seeking to appeal. We held, therefore, that jurisdiction was lacking on appeal with respect to the individual plaintiffs. We, of course, have no quarrel with this holding, and have no intent whatever to avoid or ignore this decision of our entire court. The notice of appeal in this case, however, is materially different.

Minority Employees cited two earlier opinions of this court in reaching its majority decision. The first, *Van*

Hoose v. Edison, 450 F.2d 746 (6th Cir. 1971), dealt with four plaintiffs who sued for relief against a school board, and a notice of appeal which simply indicated "Floyd Van Hoose, et al., Plaintiffs-Appellants v. William P. Edison, et al." Nowhere was there indication in *Van Hoose* that other specified or defined individuals were joining Van Hoose in bringing the appeal. "The *only party specified* in the notice of appeal" was Van Hoose. *Id.* at 747 (emphasis added). We held, accordingly, that only Van Hoose was before us on appeal.

The second case upon which this court relied as authority in *Minority Employees* was *Lifetime Doors, Inc. v. Walled Lake Door Co.*, 505 F.2d 1165 (6th Cir. 1974). The facts of the latter case are even farther removed from the facts of the instant appeal. Lifetime Doors was the only original complainant; later, by amendment, Gilbert, an individual purported investor, was added in this patent dispute. The notice of appeal, after a decision for defendant, was:

> Notice is hereby given that Lifetime Doors, Inc. Plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit.

Id. at 1167. The notice was signed by counsel for both plaintiffs, who attempted to include Gilbert in the appeal unsuccessfully. "Since Gilbert was not named in the notice of appeal," we held that "he simply did not appeal," and we had no jurisdiction over Gilbert. *Id.* at 1168.

In *Torres*, 487 U.S. at 312, fifteen of sixteen named plaintiffs were included in the notice of appeal. Torres was omitted due to a clerical error. Because he was "never named or otherwise designated" in the notice of appeal, the Supreme Court held that there was no jurisdiction over Torres' appeal despite the "harsh result." *Id.* at 318. Not only was there a failure to name Torres in the notice of appeal, there was no notice or basis of constructive notice to alert defendant that Torres sought to challenge the district court decision. The instant

notice of appeal, on the other hand, alerts defendant that "all of the Plaintiffs" to the action seek to appeal.

We have stated why we believe that none of the Sixth Circuit cases, nor *Torres*, require that we dismiss this appeal on jurisdictional grounds as to all plaintiffs but Adkins. While any plaintiff puts his appeallate rights in jeopardy if he fails to include his name in the notice of appeal, in this instance we are persuaded that we have jurisdiction to consider the claims of the multiple plaintiffs. We have never previously dismissed an appeal on jurisdictional grounds where the body of the notice of appeal makes specific reference to *all of the plaintiffs* named in the complaint and amendment thereto. Of the cases cited by defendant or the dissent, none involve one, such as this, which designates appeal by *all* of the plaintiffs named in the complaint.

We are aware, however, that *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (10th Cir. 1988), reached a contrary result where, under confused circumstances, the only named plaintiffs in the notice of appeal had withdrawn, the court held that the expression, "*all* plaintiffs appeal," was insufficient to cover other plaintiffs who had not withdrawn. A later case, *Storage Technology Corp. v. U.S. District Court*, No. 90-1342 (10th Cir. May 23, 1991 (1991 U.S. App. LEXIS 10350), which involved an appeal from a bankruptcy court judgment by defendants, was decided based on Bankruptcy Rule 8001(a) held to have notice of appeal requirements "more strict than those of Fed. R. App. P. 3(c)." We feel these cases to be distinguishable, but, in any event, they are not persuasive on the facts here involved.

We stated in *Minority Employees*, 901 F.2d at 1335, moreover, "it would appear to us that there may be some departures from naming in the body of the notice that will not be found to be fatal." The notice of appeal in this case, contrary to the assertions of the dissent, do

give notice that all dissatisfied remaining plaintiffs, adversely affected by the district court's judgment, appeal.[6]

We, therefore, conclude that we have jurisdiction over all plaintiffs who pursued the complaint in the district court to final judgment.

DISCOVERY CUTOFF

We give deference generally to the decision of the district court with respect to reasonable limitation of discovery. *Chrysler Corp. v. Feddors Corp.*, 643 F.2d 1229, 1240 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981). As noted heretofore, defendants filed a motion for summary judgment and a motion to limit discovery shortly after plaintiffs had initiated discovery requests. One of the bases for defendants' motion was its legal position that plaintiffs had "failed to exhaust internal union grievance procedures." J A 169. The district court, in granting the motion to limit and in granting defendants' summary judgment motion, never ruled on this legal contention. As indicated, a number of plaintiffs responded with an affidavit, which purported to relate to other plaintiffs in the same posture, to the effect that they were former Leslie or McInnes employees, "attempted to sign up" for union duty and benefits during the strike; were "ready, willing and able to return to work" in the mines in question; and sought union assistance unsuccessfully. They also claimed that pursuing a grievance would have been futile under the circumstances.

We believe, at least as far as the seven affiants were concerned, that the response by affidavit raised genuine factual issues, particularly as to any requirement of exhaustion of internal union grievance procedures. It was

---

[6] The majority in *Minority Employees* emphasized that "the use of the term 'plaintiffs' in the body of the notice failed to designate the individual plaintiffs." *Id.* at 1322. Plaintiffs had failed there to designate *all* the plaintiffs. *See* the concurring opinion of Judge Guy.

error to have limited discovery, then, on this basis urged by defendants.

Next, defendants argued in support of limiting discovery as a legal contention, that plaintiffs were not "'employees' under Section 2(3) of the National Labor Relations Act ('NLRA')." J/A 169. Again, we are persuaded that, at least as to the affiants and others similarly situated among the named plaintiffs, there was a genuine issue of material fact as to whether plaintiffs, or at least some of them, were "employees" within the meaning of the NLRA. Again, it was error to preclude the opportunity for plaintiffs to show whether they were, in fact, "employees" under the Act, and thus owed a duty of fair representation by defendants.

We hold, under the circumstances, that the district court erred in limiting discovery and therefore inappropriately curtailed plaintiffs' ability to demonstrate that defendants displayed "hostility, discrimination, arbitrariness or capriciousness" in choosing 245 miners for settlement benefits and allegedly ignoring or passing over more than 300 other miners, plaintiffs herein, who claim to be similarly situated, former employees at the same mines and/or under the same employers who were being struck. These plaintiffs also claimed that they were union members, or thought that they were being represented by defendants during the strike period.

SUMMARY JUDGMENT

This court reviews de novo a district court's grant of summary judgment, "apply[ing] the same test as that used by the district court in reviewing a motion for summary judgment." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1161 (6th Cir. 1988) *citing Hand v. Central Transport, Inc.*, 779 F.2d 8, 10 (6th Cir. 1985). When considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the inference to be drawn from the underlying facts con-

tained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold*, 369 U.S. 654, 655 (1962); *see also 60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). However, the nonmoving party bears the responsibility to demonstrate that summary judgment is inappropritae under Rule 56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C). "The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, " '[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 252).

In order to assert a duty of fair representation claim, the plaintiffs must be employees to whom the union owes a duty. 29 U.S.C. section 152(3); *Vaca v. Sipes*, 386 U.S. 171, 207 (1967). Plaintiffs also must prove that the union's conduct toward them in connection with a matter involving the negotiation or supervision of a collective bargaining agreement is "arbitrary, discriminatory or in bad faith." *Id.* at 207.

In discussing the limitation of discovery, we have indicated that genuine issues of material fact were presented by plaintiffs, or at least some of them, as to whether they were "employees" and whether they should have been required to pursue internal union remedies, if any were available. In light of Robert's declaration filed in the case, it was conceded that Robert had purchased Leslie and McInnes mines or assets and that Massey, the

target of the strike, had ultimately bought the Leslie and McInnes mines and intended to operate them "non union." Plaintiffs claimed to be former union employees at Leslie or McInnes. Defendant Roberts also "declared" that some former Robert employees joined the strike and picketed while others did not. He, therefore, excluded the latter from settlement benefits.

The key issue, then, on the question of a duty to represent fairly was whether plaintiffs, or any of them, actually declined to join the strike, or to perform picketing, and/or whether plaintiffs "left" the union during the relevant period.

Affiants claimed to have been laid off at McInnes or Leslie mines, and they claimed to have remained union members during the relevant period. They claimed to have "attempted to sign up," and were precluded from doing so by defendants, in substance. We are persuaded that under all the circumstances summary judgment was inappropritae and that at least carefully limited discovery should have been permitted in the areas where legal defenses were raised that may constitute a successful bar to plaintiff's actions ("employee" status, union membership, and exhaustion of union administrative remedies).

We, therefore, REVERSE the award of summary judgment and REMAND for further proceedings consistent with this opinoon.

KRUPANSKY, Circuit Judge, Dissenting. The panel majority's statement to the contrary, the notice of appeal in this case is substantively the same as the notice of appeal the en banc court of this circuit found insufficient in *Minority Employees of Tenn. Dep't of Employment Service, Inc. v. State of Tennessee*, 901 F.2d 1327 (6th Cir. 1990) (en banc). The majority relies on language in the body of the notice of appeal to salvage the deficient caption. The body of the notice of appeal in *Minority Employees* read: "Now come plaintiffs in the above case and appeal . . . ." *Minority Employees*, 901 F.2d at 1330. The body of the notice of appeal in this case reads: "Notice is hereby given that all of the Plaintiffs to this action as set out in *the Complaint which has been filed herein as well as in all amendments hereby appeal . . . .*" In attempting to distinguish the instant case from *Minority Employees*, the majority relies entirely upon the word "all" and erroneously states that none of our previous cases dismissed an appeal when the body of the complaint made reference to "all" the plaintiffs named in the complaint or amendments thereto. The panel majority's rationalizes that the en banc court in *Minority Employees* dismissed the notice of appeal because "the plaintiffs" might have meant "some" of the plaintiffs, not "all" of the plaintiffs.

Minority Employees did not rest on such a slim reed. Only one plaintiff was specifically named in the caption, "Minority Employees of the Tennessee Department of Employment Security," a corporate plaintiff. The en banc court concluded that "the appellants *must include in the notice of appeal the name of each and every party taking the appeal.*" *Minority Employees*, 901 F.2d at 1330. Nothing could be more explicit. The court relied upon *Torres v. Oakland Scavanger Co.*, 108 S.Ct 2405 (1988), which, contrary to the panel majority's implication, did not turn on the lack of "constructive notice," but rather upon the mandate of the *Torres* disposition, which reads:

> The failure to name a party in a notice of appeal is more than excusable "informality"; *it constitutes a failure of that party to appeal.*

The wisdom of the Supreme Court's pronouncements are demonstrated by the instant notice of appeal which provides "Notice is hereby given that all of the Plaintiffs to this action as *set out in the Complaint* which has been filed herein *as well as* in all amendments hereby appeal. . . ."

Mindful of the above language, the record of the instant proceedings challenges the majority to determine with certitude the identity of the appellants not named in the notice of appeal who may be bound by an adverse judgment or who may be held liable for costs or sanctions in these proceedings when it is apparent on the face of that record that the named parties plaintiff in the initial complaint are *significantly different* from those identified in the amended complaint in that a *number of the named plaintiffs identified* in the *initial complaint voluntarily withdrew* from the action at some point in time before the amended complaint which joined additional parties plaintiff not named or identified in the initial complaint was filed.[1]

---

[1] The panel majority misinterprets and misconceives *Storage Technology Corp. v. United States District Court for the District of Colorado*, No. 90-1342 (10th Cir. May 23, 1991). In that case, the body of the notice of appeal in controversy identified appellants as "Comite Pro Rescate de la Salud, et al., *and all the Defendants of record herein.*" *Storage Technology*, slip op. at 3 (emphasis added). The Tenth Circuit concluded that the notice was inadequate and did not embrace any appellant beyond the appellant actually named therein:

> In *Laidley v. McClain*, 914 F.2d 1386, 1389 (10th Cir. 1990), we held that "the failure to specifically designate a party somewhere in the notice of appeal is a jurisdictional bar to that party's appeal." We rejected the use of " 'plaintiffs hereby appeal,' when combined with an 'et al.' designation of some of the plaintiffs" as subject to the interpretation either that all of the plaintiffs intended to appeal or that less than all plaintiffs intended to be appellants. *Id.* Likewise, in *Pratt v. Petro-*

The dissent in *Minority Employees* advanced essentially the same reasoning adopted by this panel's majority and argued that the word "plaintiffs" in the body of the

---

leum Production, 920 F.2d at 654, we held the phrase "defendants above named hereby appeal" in conjunction with an "et al." to be insufficient to meet the specificity requirements of Fed. R. App. P. 3(c) and *Torres*. We relied in *Pratt*, as we had in *Laidley*, on *Minority Employees of Tennessee Department of Employment Securities, Inc. v. Tennessee Department of Employment Securities*, 901 F.2d 1327, 1360 (6th Cir.) (en banc), *cert. denied*, —— U.S. ——, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990) (name of each and every party taking appeal must be included in notice of appeal) and *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 317 (1st Cir. 1989) (en banc) (court lacked jurisdiction over appeals sponsored by would-be appellants not specified in timely notice of appeal).

Storage Technology, slip op at 7-8.

The language of the Tenth Circuit, siting to this Circuit's disposition of *Minority Employees*, accordingly belies the panel majority's analysis of *Storage Technology*.

In *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988), the text of the notice of appeal identified appeals as follows: "*All* plaintiffs appeal to the first Circuit Court of Appeals to the Opinion and Order of November 30, 1987." *Santos-Martinez*, 863 F.2d at 175 (emphasis added). In *Santos-Martinez*, as in the instant case, a number of the named parties identified in the initial complaint voluntarily withdrew from the action at some point in time before the notice of appeal was filed.

In addressing the adequacy of the notice of appeal, the First Circuit noted:

> In their supplementary brief, appellants argue that their case is distinguished from *Torres* by the statement in the notice of appeal that "*All* plaintiffs appeal . . ." (Emphasis added.) But most of the Supreme Court's reasoning for rejecting the "et al." designation applies equally in the circumstances of this case to the words, "All plaintiffs."
>
> *Santos-Martinez*, 863 F.2d at 176.

In disposing of the appeal, the First Circuit concluded:

> That the appellees and the court might, by further inquiry, eventually ascertain the identity of the actual appellants is not enough, as the *Torres* Court has indicated in its near-unanimous decision. Appellants must comply with the language of Rule

otherwise unspecific notice of appeal gave sufficient notice of the parties appealing. *Minority Employees*, 901 F.2d at 1341-1348 (Nelson, J., dissenting). Although the argument was rejected by the en banc court in *Minority Employees*, the panel majority now seeks to evade this circuit's en banc pronouncements by erroneously reasoning that "all the plaintiffs" is the same as "the appellants *must* include in its notice of appeal *the name* of *each* and *every party* taking the appeal." Thus, in the process of embracing the dissent, the panel majority has elevated the redundancy of the word "all" to a principle of appellate jurisdiction.

In *Minority Employees*, the en banc court admonished against the use of nice semantic distinctions to avoid the mandate of Fed.R.App.P. 3(c) and *Torres* when it rejected the holding of *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989). In *Ford*, the panel had concluded that a notice of appeal captioned, in part, "Chancellor Roy S. Nicks, et al. Defendants" sufficiently designated the appellants. *Ford*, 866 F.2d at 869. According to the *Ford* panel of this court, because of the lack of articles in Latin, "et al." could mean "and others" or "and the others," depending upon the context within which it was used. Accordingly, the *Ford* panel reasoned that since "the" appeared in the body of the caption, the notice of appeal conveyed the intention of "all" "the" eighteen defendants to appeal.

3(c)—that is, they must "specify the party or parties taking the appeal." It does not suffice that the actual appellants are now known and that no harm may have been done by reason of the insufficient notice of appeal. Because Rule 3(c) is jurisdictional, the Supreme Court has stated that "harmless error" analysis is inapplicable to a defect in the notice of appeal: "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court." *Torres*, 108 S.Ct. at 2409 n. 3. *See also Hays v. Sony Corp. of America*, 847 F.2d 412, 420 (7th Cir. 1988) (noting that under *Torres* the failure to name an appellant in a notice of appeal necessitates dismissal of the appeal, even if the appellee was not misled).

Santos-Martinez, 863 F.2d at 177 (footnote omitted).

Ford, 866 F.2d at 869. In rejecting this reasoning, the en banc court stated that even if the *Ford* approach was consistent with *Torres*, "we cannot permit our jurisdiction to turn on the presence or absence of the definite article." *Minority Employees*, 901 F.2d at 1333.

As both *Torres* and *Minority Employees* recognized, the purpose of the notice of appeal is to identify the appellants for the opposing party and the court. This notice requirement is "jurisdictional and mandatory." *Torres*, 108 S.Ct. at 2408 (quotations omitted). Jurisdiction can not turn on a panel's ingenuity in creating artificial constructs of language, and a panel may not withhold the sometime harsh application of this rule simply because a particular case has merit. Such judicial action defeats the basic purpose of our procedural rules: to secure "a fair and orderly process." *Torres*, 108 S.Ct. at 2410 (Scalia, J., dissenting). Only an even-handed enforcement of the terms of Fed.R.App.P. 3(c) will preserve a fair and orderly process for "all" litigants. It appears that the majority opinion has successfully created confusion from the order which resulted from the *en banc* resolution of *Minority Employees*.

The bench, the federal bar, and the public have a right to know what the precedent in this circuit dictates as to this jurisdictional issue of importance. Must the notice of appeal include "*the name of each and every party taking the appeal*" as mandated by the en banc decision of this circuit in *Minority Employees* or is that decision now superceded by this panel's majority opinion in the instant case which advises that *the name of each and every party taking the appeal need not be included in the notice of appeal* so long as the notice of appeal states that "notice is hereby given that all the Plaintiffs to this action . . . hereby appeal."

A review of the remaining issues as they relate to the single remaining plaintiff who was actually named in the

notice of appeal, discloses that the district court did not abuse its discretion in staying discovery pending the disposition of the summary judgment motion. Prior to ruling on the motion, the court afforded the plaintiff an opportunity to explain the relevancy of his interrogatories and document production requests to the subject matter of the motion for summary judgment. The plaintiffs failed to do so and responded with the conclusory statement that the discovery was "clearly relevant."

Considering the district court's disposition of the summary judgment motion, wherein it found no evidence of a breach of duty of fair representation as it related to the sole remaining plaintiff, and according the sole remaining plaintiff the benefit of all the evidence submitted in opposition to the summary judgment motion, together with every favorable inference that may have been drawn from all the evidence presented, the district court's judgment was clearly correct. The plaintiff simply has not joined issues of fact that would prove that the union, by distributing the small strike settlement among the union employees who actually engaged in the four-year picket, intentionally discriminated against him. I must accordingly respectfully dissent and would affirm the district court.

APPENDIX B

US COURT OF APPEALS
SIXTH CIRCUIT

ADKINS

v.

UNITED MINE WORKERS OF AMERICA

May 30, 1991

On appeal from the Eastern District of Kentucky. Before KEITH and KRUPANSKY, Circuit Judges, and WELLFORD, Senior Circuit Judge.

WELLFORD, Senior Circuit Judge. Clarence M. Adkins and 306 other miners in Kentucky [1] sued defendant Union [2] under § 301 of the Labor Management Relations Act in 1988. The plaintiffs asserted that they were "all former employees of either Leslie Coal Mining Company (Leslie) or McInnes Coal Mining Co. (McInnes)" and members of the defendant Union (UMWA), which was the "exclusive bargaining representative for employees of Leslie and McInnes."

The complaint recited that UMWA had filed suit in 1984 against a number of mining companies, including Leslie, McInnes, Sidney Coal Company (Sidney), and Robert Coal Company (Robert) in the same district court in which the suit at issue was filed, and that the suit was

---

[1] An amended complaint deleted the names of six original plaintiffs and added sixteen individual plaintiffs.

[2] They also sued Richard Trumpka, President of UMWA, and Cecil E. Roberts, Vice president of UMWA, as well as John J. Banovic, Treasurer of UMWA. The individuals have been dismissed.

on behalf of "all individual members" of UMWA "adversely affected by alleged breach of contract and conspiracy by defendants in said [1984] complaint." Again, in the complaint at issue, plaintiffs asserted that UMWA obtained $4,470,000 settlement in the 1984 lawsuit "to be distributed . . . in the sole discretion of the Union." (Sidney was also to set aside coal reserves in and around the McInnes mine as a part of the settlement).

Plaintiffs claimed that UMWA caused the settlement to benefit only 245 of the men "adversely affected by the actions alleged in the lawsuit," and that these favored 245 men received cash, benefits, and hiring privileges through defendant Union's actions while plaintiffs received nothing. Plaintiffs contended that UMWA violated a duty to represent all Union members "without hostility, discrimination, arbitrariness or capriciousness"; in short, a "duty of fair representation," and also that the Union had acted in "bad faith." [3]

Plaintiffs averred that they were denied the right by the Union and its officers in conspiracy to attend Union meetings and to "assemble freely with other members" in violation of their rights and the Union constitution. The allegations included a claim that the defendant Union's actions "were an attempt to sidestep the collective bargaining agreement," and were done "willfully and or maliciously." As a consequence, plaintiffs claimed damages, compensatory and punitive, and reimbursement of costs and other relief.

Defendant Union, after institution of discovery by plaintiffs, moved for summary judgment and for a protective order staying discovery pending resolution of the summary judgment motion, claiming that plaintiffs' interrogatories and production requests were "not pertinent

---

[3] The complaint also made reference to a Union constitutional duty of faithful representation in enforcement of collective bargaining rights, and to "meet and assemble freely."

to issues raised in the UMWA's dispositive motion" under Fed. R. Civ. P. 26(c).

The basis of defendant Union's "dispositive" motion was that plaintiffs had "no employment relationship . . . and the Union had no collective bargaining relationship . . . with any of these companies [A. T. Massey Coal Company and certain of its subsidiaries]." UMWA claimed in the summary judgment motion that plaintiffs were not "employees" to whom it owed a duty because they "had been laid off for two years prior to the union's dispute with Massey."[4] As a backup position, the Union claimed that it "acted reasonably and entirely consistent with its duty" in the settlement. The latter position seems clearly to put at issue the substance and merits of plaintiffs' basic claim. Affirmatively, as grounds of the Union's motion, it claimed that it "treated the [settlement] money as severance to those persons who had for nearly four years tried to regain an employment opportunity." Finally, the summary judgment motion asserted failure to exhaust internal Union grievance procedures.

In respect to the third position, it is obviously inconsistent with the UMWA's first position that plaintiffs were owed no duty by the Union. Original defendant Cecil E. Roberts filed an unsworn "declaration" which was attached to the motion for summary judgment that he took responsibility for negotiating a settlement of the UMWA's "labor dispute" with Massey concerning some 19 mines in Kentucky and West Virginia. Roberts declared that UMWA authorized a strike" on October 1, 1984 at a number of Massey locations." Roberts declared that on or about that date he "learned that Massey had bought the Leslie and McInnes" mines, which had been shut down since February 1983. (Robert had purportedly operated

---

[4] Neither A. J. Massey Coal Company (Massey) nor any alleged subsidiary company of Massey, as such, was mentioned in the complaint.

Leslie and McInnes, and "had employed UMWA-represented employees").

Roberts' declaration (not to be confused with Robert Coal Company) claimed that when Robert purchased Leslie and McInnes, Massey announced it would operate these "non-union," and that "in response, the UMWA called on the former Robert employees who had previously worked at the Leslie/McInnes Mines to respond to the situation" and "strike against Massey." Roberts further declared, on behalf of the Union for which he served as vice president, that "former Robert employees who responded to the [Union's] call and engaged in the strike" were given strike benefits by UMWA.

Roberts' declaration also stated that "approximately 250 former Robert employees from the Leslie/McInnes Mines joined the strike," and the "other former Robert employees did not." The settlement finally ensued despite dismissal by the district court of Massey and "all the buyers of the Leslie/McInnes Mines." Roberts declared that it was a "Leslie/McInnes settlement" that brought about payment of the four plus million dollars and reopening of the McInnes Mine under a UMWA collective bargaining agreement and withdrawal of strike activity at the "former Leslie Mine." Roberts decided to pay "245 individuals who still remained in the UMWA Selective Strike Program" in the form of severance "and other benefits." He declared that these 245 "retained their employment connection to the bargaining unit" and that plaintiffs "had left it," adding that plaintiffs were never employed by Massey, "the payor." Finally, Roberts declared that he found no charges by plaintiffs to the Union's International Executive Board about terms of the settlement as required by the Union constitution.

The magistrate, to whom the 1984 lawsuit in the UMWA case was referred, had found "Robert, Leslie, McInnes and Others" in the "Seller Group" of defendants and Sidney and A. J. Massey among the "Buyers Group."

He found that Robert, who had signed a UMWA contract, operated Leslie and McInnes before their sale to a Massey subsidiary, Sidney, which refused to assume obligations under the UMWA agreement. (Leslie and McInnes were not "signatories" to the UMWA agreement). The prior UMWA suit involved whether there was substantial continuity between Robert, Leslie and McInnes, and Massey or its subsidiaries. The settlement agreement included UMWA's representation that it had authority to make the settlement "on behalf of the persons and entities referred to collectively as the Union."

On January 4, 1989, plaintiffs' counsel, after filing discovery motions, estimated six months to complete discovery after receiving an answer to the original discovery. Within a month, defendant filed its summary judgment motion and motion to limit or postpone discovery. In its motion, UMWA conceded that those asked to join the strike were "former Robert employees who had worked at the mines some twenty-one months earlier," and that "245 former Robert workers joined the strike." The Union claimed that only the latter were entitled to settlement benefits because they "endured the greatest hardship" and "manifested a continuing interest in regaining employment."

In response to the UMWA motion for summary judgment, seven plaintiffs[5] filed an affidavit contending that each was either a Leslie or McInnes employee ("as were all of the other Plaintiffs") and that when laid off, all were UMWA members and remained so "at all relevant times." The affiants claim that they were advised by the local union president that they, and all other plaintiffs, "were being represented by the Union" in its 1984 lawsuit and that they were mailed a copy of a subsequent injunction order in 1985 pertinent to that suit. Affiants claim they did not see or hear Union advertisements about

[5] The seven are Hammond, Hensley, Varney, Bailey, Preece, Case, and Justice.

signing up "for the strike fund," but heard about it and "attempted to sign up" unsuccessfully. They claim that they expected to be recalled as part of the settlement because they were (as were other plaintiffs) "ready, willing and able to return to work." Affiants claimed to have called a UMWA official for assistance but were rejected and that both international and local Union officials refused to institute any grievance for them. They claim that after the settlement, the Union would not allow them to attend Union meetings or take part in Union activities pertaining to the settlement. Affiants claim that there is no UMWA constitutional provision providing for a grievance against the Union itself, and that any grievance would be futile in any event.

Unsworn responsive "declarations" to the seven plaintiffs' affidavits were filed by Union agents or officials indicating that Bailey was sent a certified letter in 1985 and that "he worked non-union during the strike"; that Varney transferred into another local union, and he also was sent a 1985 registered letter; that Hensley and Preece obtained fulltime employment; that Hammond worked at a non-union mine; that Case was disabled; and that Justice "went to work non-union during the strike," and had abandoned the strike and had a suit against UMWA dismissed for failure to exhaust internal union benefits.

The district court, in granting the Union summary judgment, held that although plaintiffs may not have been "employees" in the statutory sense, the Union owed plaintiffs a duty of fair representation. As to this ground of UMWA's motion limiting discovery, plaintiffs then have no complaint. Because plaintiffs were "unable to demonstrate" Union hostility or discriminatory conduct, however, UMWA was granted summary judgment. The district court held that both plaintiffs and the 245 strike settlement beneficiaries to have been "former coworkers," and thus in the same general class or category, and that "plaintiffs failed to respond to the Union's invitation to

engage in the picketing," and made further findings on the same undisclosed basis, that some plaintiffs "gained other employment, . . . and some moved to other areas."

The district court made a decision, then, on the merits of plaintiffs' claim of lack of fair representation apparently based on unsworn statements by defendant lawyers and officials. It made no decision on the Union contention of failure to exhaust, or plaintiffs' claimed justification for not pursuing exhaustion further.

Jurisdiction

The timely notice of appeal in this case was as follows:

"CLARENCE M. ADKINS, *et al.*,

Plaintiffs

v.

UNITED MINE WORKERS OF AMERICA, *et al.*,

Defendants

Notice of Appeal

Notice is hereby given that all of the Plaintiffs to this action as set out in the Complaint which has been filed herein as well as in all amendments thereto hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Order entering summary judgment on behalf of the Defendants as filed on February 8, 1990 and with notice being given of the entry of the order on February 9, 1990 in this court."

J.A. 33.

Defendant moved to dismiss for a jurisdictional defect in this notice based upon use of the words "et al" in the caption rather than listing all of the plaintiffs by name. This issue was recently addressed by this court en banc in Minority Employees of Tenn. Dep't of Employment Sec., Inc. v. State of Tennessee, 901 F.2d 1327 (6th Cir.

1990). The Supreme Court also recently has addressed this jurisdictional issue in Torres v. Oakland Scavenger Co., 487 U.S. 312 [11 Fed Rules Serv 3d 6] (1988). We were almost evenly divided on a somewhat similar issue in Minority Employees, and it now behooves us to examine the facts in that case with those in the present case.

Minority Employees involved a first named entity, Minority Employees of the Tennessee Department of Employment Security, Inc. (Minority Employees), and several individual plaintiffs. After an adverse decision in the district court, a notice of appeal was filed designating as the appealing party an "appellant." Nowhere in the caption or body of the notice of appeal in Minority Employees was there an indication that more than one appellant, the group, was seeking to appeal. We held, therefore, that jurisdiction was lacking on appeal with respect to the individual plaintiffs. We, of course, have no quarrel with this holding, and have no intent whatever to avoid or ignore this decision of our entire court. The notice of appeal in this case, however, is materially different.

Minority Employees cited two earlier opinions of this court in reaching its majority decision. The first, Van Hoose v. Eidson, 450 F.2d 746 (6th Cir. 1971), dealt with four plaintiffs who sued for relief against a school board, and a notice of appeal which simply indicated "Floyd Van Hoose et al., Plaintiffs-Appellants v. William P. Eidson, et al." Nowhere was there indication in Van Hoose that other specified or defined individuals were joining Van Hoose in bringing the appeal. "The *only party specified* in the notice of appeal" was Van Hoose. Id. at 747 (emphasis added). We held, accordingly, that only Van Hoose was before us on appeal.

The second case upon which this court relied as authority in Minority Employees was Lifetime Doors, Inc. v. Walled Lake Door Co., 505 F.2d 1165 (6th Cir. 1974). The facts of the latter case are even farther removed from the facts of the instant appeal. Lifetime Doors was the

only original complainant; later, by amendment, Gilbert, an individual purported investor, was added in this patent dispute. The notice of appeal, after a decision for defendant, was:

> "Notice is hereby given that Lifetime Doors, Inc. Plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit."

Id. at 1167. The notice was signed by counsel for both plaintiffs, who attempted to include Gilbert in the appeal unsuccessfully. "Since Gilbert was not named in the notice of appeal," we held that "he simply did not appeal," and we had no jurisdiction over Gilbert. Id. at 1168.

In Torres, 487 U.S. at 312, fifteen of sixteen named plaintiffs were included in the notice of appeal. Torres was omitted due to a clerical error. Because he was "never named or otherwise designated" in the notice of appeal, the Supreme Court held that there was no jurisdiction over Torres' appeal despite the "harsh result." Id. at 318. Not only was there a failure to name Torres in the notice of appeal, there was no notice or basis of constructive notice to alert defendant that Torres sought to challenge the district court decision. The instant notice of appeal, on the other hand, alerts defendant that "all of the Plaintiffs" to the action seek to appeal.

We have stated why we believe that none of the Sixth Circuit cases, nor Torres, require that we dismiss this appeal on jurisdictional grounds as to all plaintiffs but Adkins. While any plaintiff puts his appellate rights in jeopardy if he fails to include his name in the notice of appeal, in this instance we are persuaded that we have jurisdiction to consider the claims of the multiple plaintiffs. We have never previously dismissed an appeal on jurisdictional grounds where the body of the notice of appeal makes specific reference to *all of the plaintiffs* named in the complaint and amendment thereto. None of the cases from other circuits cited by defendant or the

dissent involve a notice of appeal that specifically designates by *all* of the plaintiffs named in the complaint.

We stated in Minority Employees, 901 F.2d at 1335, moreover, "it would appear to us that there may be some departures from naming in the body of the notice that will not be found to be fatal." The notice of appeal in this case, contrary to the assertions of the dissent, do give notice that all dissatisfied remaining plaintiffs, adversely affected by the district court's judgment, appeal.[6]

We, therefore, conclude that we have jurisdiction over all plaintiffs who pursued the complaint in the district court to final judgment.

Discovery Cutoff

We give deference generally to the decision of the district court with respect to reasonable limitation of discovery. Chrysler Corp. v. Feddors Corp., 643 F.2d 1229, 1240 [35 Fed. Rules Serv 2d 513] (6th Cir.), cert. denied, 454 U.S. 893 (1981). As noted heretofore, defendants filed a motion for summary judgment and a motion to limit discovery shortly after plaintiffs had initiated discovery requests. One of the bases for defendants' motion was its legal position that plaintiffs had "failed to exhaust internal union grievance procedures." J/A 169. The district court, in granting the motion to limit and in granting defendants' summary judgment motion, never ruled on this legal contention. As indicated, a number of plaintiffs responded with an affidavit, which purported to relate to other plaintiffs in the same posture, to the effect that they were former Leslie or McInnes employees, "attempted to sign up" for union duty and benefits during the strike; were "ready, will-

[6] The majority in Minority Employees emphasized that "the use of the term 'plaintiffs' in the body of the notice failed to designate the individual plaintiffs." Id. at 1322. Plaintiffs had failed there to designate all the plaintiffs. See the concurring opinion of Judge Guy.

ing and able to return to work" in the mines in question; and sought union assistance unsuccessfully. They also claimed that pursuing a grievance would have been futile under the circumstances.

We believe, at least as far as the seven affiants were concerned, that the response by affidavit raised genuine factual issues, particulary as to any requirement of exhaustion of internal union grievance procedures. It was error to have limited discovery, then, on this basis urged by defendants.

Next, defendants argued in support of limiting discovery as a legal contention, that plaintiffs were not "'employees' under Section 2(3) of the National Labor Relations Act ('NLRA')." J/A 169. Again, we are persuaded that, at least as to the affiants and others similarly situated among the named plaintiffs, there was a genuine issue of material fact as to whether plaintiffs, or at least some of them, were "employees" within the meaning of the NLRA. Again, it was error to preclude the opportunity for plaintiffs to show whether they were, in fact, "employees" under the Act, and thus owed a duty of fair representation by defendants.

We hold, under the circumstances, that the district court erred in limiting discovery and therefore inappropriately curtailed plaintiffs' ability to demonstrate that defendants displayed "hostility, discrimination, arbitrariness or capriciousness" in choosing 245 miners for settlement benefits and allegedly ignoring or passing over more than 300 other miners, plaintiffs herein, who claim to be similarly situated, former employees at the same mines and/or under the same employers who were being struck. These plaintiffs also claimed that they were union members, or thought that they were being represented by defendants during the strike period.

Summary Judgment

This court reviews de novo a district court's grant of summary judgment, "apply[ing] the same test as that

used by the district court in reviewing a motion for summary judgment." Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1161 (6th Cir. 1988) citing Hand v. Central Transport, Inc., 779 F.2d 8, 10 (6th Cir. 1985). When considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the inference to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, 369 U.S. 654, 655 [5 Fed Rules Serv 2d 915] (1962); see also 60 Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987). However, the nonmoving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C). "The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 [4 Fed Rules Serv 3d 1041] (1986). However, "'[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 252).

In order to assert a duty of fair representation claim, the plaintiffs must be employees to whom the union owes a duty. 29 U.S.C. section 152(3); Vaca v. Sipes, 386 U.S. 171, 207 (1967). Plaintiffs also must prove that the union's conduct toward them in connection with a matter involving the negotiation or supervision of a collective bargaining agreement is "arbitrary, discriminatory or in bad faith." Id. at 207.

In discussing the limitation of discovery, we have indicated that genuine issues of material fact were presented by plaintiffs, or at least some of them, as to whether they were "employees" and whether they should have been required to pursue internal union remedies, if any were available. In light of Roberts' declaration filed in the case, it was conceded that Robert had purchased Leslie and McInnes mines or assets and that Massey, the target of the strike, had ultimately bought the Leslie and McInnes mines and intended to operate them "non union." Plaintiffs claimed to be former union employees at Leslie or McInnes. Defendant Roberts also "declared" that some former Robert employees joined the strike and picketed while others did not. He, therefore, excluded the latter from settlement benefits.

The key issue, then, on the question of a duty to represent fairly was whether plaintiffs, or any of them, actually declined to join the strike, or to perform picketing, and/or whether plaintiffs "left" the union during the relevant period.

Affiants claimed to have been laid off at McInnes or Leslie mines, and they claimed to have remained union members during the relevant period. They claimed to have "attempted to sign up," and were precluded from doing so by defendants, in substance. We are persuaded that under all the circumstances summary judgment was inappropriate and that at least carefully limited discovery should have been permitted in the areas where legal defenses were raised that may constitute a successful bar to plaintiffs' actions ("employee" status, union membership, and exhaustion of union administrative remedies).

We, therefore, reverse the award of summary judgment and remand for further proceedings consistent with this opinion.

KRUPANSKY, Circuit Judge, dissenting. The panel majority's statement to the contrary, the notice of appeal in this case is substantively the same as the notice of appeal the en banc court of this circuit found insufficient in Minority Employee of Tenn. Dep't of Employment Service, Inc. v. State of Tennessee, 901 F.2d 1327 (6th Cir. 1990) (en banc). The majority relies on language in the body of the notice of appeal to salvage the deficient caption. The body of the notice of appeal in Minority Employees read: "Now come plaintiffs in the above case and appeal. . . ." Minority Employees, 901 F.2d at 1330. The body of the notice of appeal in this case reads: "Notice is hereby given that all of the Plaintiffs to this action as set out in *the Complaint which has been filed herein as well as in all amendments hereby appeal.* . . ." In attempting to distinguish the instant case from Minority Employees, the majority relies entirely upon the word "all" and erroneously states that none of our previous cases dismissed an appeal when the body of the complaint made reference to "all" the plaintiffs named in the complaint or amendments thereto. The panel majority's rationalizes that the en banc court in Minority Employees dismissed the notice of appeal because "the plaintiffs" might have meant "some" of the plaintiffs, not "all" of the plaintiffs.

Minority Employees did not rest on such a slim reed. Only one plaintiff was specifically named in the caption, "Minority Employees of the Tennessee Department of Employment Security," a corporate plaintiff. The en banc court concluded that "the appellants must include in the notice of appeal the name of each and every party taking the appeal." Minority Employees, 901 F.2d at 1330. Nothing could be more explicit. The court relied upon Torres v. Oakland Scavanger Co., 108 S.Ct. 2405 [11 Fed Rules Serv 3d 6] (1988), which, contrary to the panel majority's implication, did not turn on the lack of "constructive notice . . . ," but rather upon the mandate of the Torres disposition which reads:

> "The failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal."

The wisdom of the Supreme Court's pronouncements are demonstrated by the instant notice of appeal which provides "Notice is hereby given that all of the Plaintiffs to this action as set out in the Complaint which has been filed herein as well as in all amendments hereby appeal. . . ."

Mindful of the above language, the record of the instant proceedings challenges the majority to determine with certitude the identity of the appellants not named in the notice of appeal who may be bound by an adverse judgment or who may be held liable for costs or sanctions in these proceedings when it is apparent on the face of that record that the named parties plaintiff in the initial complaint are *significantly different* from those identified in the amended complaint in that a *number of the named plaintiffs identified* in the *initial complaint voluntarily withdrew* from the action at some point in time before the amended complaint which joined additional parties plaintiff not named or identified in the initial complaint was filed.

The dissent in Minority Employees advanced essentially the same reasoning adopted by this panel's majority and argued that the word "plaintiffs" in the body of the otherwise unspecific notice of appeal gave sufficient notice of the parties appealing. Minority Employees, 901 F.2d at 1341-1348 (Nelson, J., dissenting). Although the argument was rejected by the en banc court in Minority Employees, the panel majority now seeks to evade this circuit's en banc pronouncements by erroneously reasoning that "all the plaintiffs" is the same as "the appellants *must* include in its notice of appeal *the name* of *each* and *every party* taking the appeal." Thus, in the process of embracing the dissent, the panel majority has elevated the redundancy of the word "all" to a principle of appellate jurisdiction.

In Minority Employees, the en banc court admonished against the use of nice semantic distinctions to avoid the mandate of Fed.R.App.P. 3(c) and Torres when it rejected the holding of Ford v. Nicks, 866 F.2d 865 [12 Fed Rules Serv 3d 1394] (6th Cir. 1989). In Ford, the panel had concluded that a notice of appeal captioned, in part, "Chancellor Roy S. Nicks, et al. Defendants" sufficiently designated the appellants. Ford, 866 F.2d at 869. According to the Ford panel of this court, because of the lack of articles in Latin, "et al." could mean "and others" or "and the others," depending upon the context within which it was used. Accordingly, the Ford panel reasoned that since "the" appeared in the body of the caption, the notice of appeal conveyed the intention of "all" "the" eighteen defendants to appeal. Ford, 866 F.2d at 869. In rejecting this reasoning, the en banc court stated that even if the Ford approach was consistent with Torres, "we cannot permit our jurisdiction to turn on the presence or absence of the definite article." Minority Employees, 901 F.2d at 1333.

As both Torres and Minority Employees recognized, the purpose of the notice of appeal is to identify the appellants for the opposing party and the court. This notice requirement is "jurisdictional and mandatory." Torres, 108 S.Ct. at 2408 (quotations omitted). Jurisdiction can not turn on a panel's ingenuity in creating artificial constructs of language, and a panel may not withhold the sometimes harsh application of this rule simply because a particular case has merit. Such judicial action defeats the basic purpose of our procedural rules: to secure "a fair and orderly process." Torres, 108 S.Ct. at 2410 (Scalia, J., dissenting). Only an even-handed enforcement of the terms of Fed.R.App.P. 3(c) will preserve a fair and orderly process for "all" litigants. It appears that the majority opinion has successfully created confusion from the order which resulted from the en banc resolution of Minority Employees.

The bench, the federal bar, and the public have a right to know what the precedent in this circuit dictates as to this jurisdictional issue of importance. Must the notice of appeal include "*the name of each and every party taking the appeal*" as mandated by the en banc decision of this circuit in Minority Employees or is that decision now superseded by this panel's majority opinion in the instant case which advises that *the name of each and every party taking the appeal need not be included in the notice of appeal* so long as the notice of appeal states that "notice is hereby given that all the Plaintiffs to this action . . . hereby appeal."

A review of the remaining issues as they relate to the single remaining plaintiff who was actually named in the notice of appeal, discloses that the district court did not abuse its discretion in staying discovery pending the disposition of the summary judgment motion. Prior to ruling on the motion, the court afforded the plaintiff an opportunity to explain the relevancy of his interrogatories and document production requests to the subject matter of the motion for summary judgment. The plaintiffs failed to do so and responded with the conclusory statement that the discovery was "clearly relevant."

Considering the district court's disposition of the summary judgment motion, wherein it found no evidence of a breach of duty of fair representation as it related to the sole remaining plaintiff, and according the sole remaining plaintiff the benefit of all the evidence submitted in opposition to the summary judgment motion, together with every favorable inference that may have been drawn from all the evidence presented, the district court's judgment was clearly correct. The plaintiff simply has not joined issues of fact that would prove that the union, by distributing the small strike settlement among the union employees who actually engaged in the four-year picket, intentionally discriminated against him. I must accordingly respectfully dissent and would affirm the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 88-281

CLARENCE M. ADKINS, *et al.*,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA, *et al.*,
Defendants.

MEMORANDUM OPINION

[Filed Feb. 8, 1990]

The plaintiffs have filed this action alleging violations of § 301 of the Labor Management Relations Act of 1947, (the "Act"), as amended, 29 U.S.C. § 1985 and several pendent state claims. Jurisdiction is conferred upon this court pursuant to § 301 of the Act and 28 U.S.C. §§ 1331 and 1337. This action is pending on the motion of the defendant for summary judgment.

The plaintiffs in this action are 307 former employees of the Robert Coal Company who worked at coal mines owned by the Leslie Coal Mining Company ("Leslie") or the McInness Coal Mining Company ("McInness"). Robert Coal Company ("Robert") ceased mining operations in February of 1983.

The Leslie and McInnes mines were sold to a subsidiary of A. T. Massey Coal Company ("Massey"), on October 1, 1984. The UMWA had previously set October 1, 1984 as the date for a strike of Massey Mines, and upon learn-

ing of the purchase of the Leslie and McInnes mines, the union invited the former Robert employees to participate in striking and picketing activities. Two hundred forty-five (245) of the former Robert employees joined the strike, thereby becoming eligible for weekly strike benefits and family health insurance.

On October 16, 1984, the UMWA filed suit against Massey alleging a conspiracy to violate the collective bargaining agreement and tortious interference with that agreement. *United Mine Workers of America v. Pickands-Mather and Co., Inc.*, C. A. No. 84-338 (E.D. Ky.). The litigation continued for over four years.

On May 27, 1988, the parties entered into a settlement. The settlement provided that the union would receive $4.47 million and in return the UMWA agreed not to "authorize or initiate any picketing or strike" at certain Massey operations for three years following execution of the settlement agreement. Massey also agreed to set aside five million tons of coal for extraction by the UMWA-represented employees under a collective bargaining agreement at the former McInnes Mine. Additionally, the participants in the selective strike were to be put on a list from which the company hired by Massey to mine the coal would offer employment. The union distributed these benefits to the 245 men who participated in the strike and picketing activities, the "Selective Strike Workers". These men received approximately $18,000 each from the settlement proceeds.

This settlement forms the basis of the claims asserted in the case at bar. The plaintiffs claim the UMWA breached a duty of fair representation in the settlement with Massey. The plaintiffs also assert two pendent state law claims, alleging the union breached its constitution because of the fair representation claim and by interfering with the plaintiffs' rights as union members to participate in internal union affairs.

Summary judgment is appropriate where, after adequate opportunity for discovery, there are no issues of material fact and one party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 202 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The issue of fact must be a real dispute; "(w)here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In *Anderison v. Liberty Lobby, supra*, the Court articulated the standards by which the trial court is to judge a motion for summary judgment:

> At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes, supra, (v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)), and *Cities Service, supra, (First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct., 1575, 20 L.Ed.2d 577 (1967) (*per curiam*), or is not significantly probative, *Cities Service, supra*, at 290, 88 S.Ct. at 1592, summary judgment may be granted.
>
> That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made, the adverse party "must set forth the specific facts showing that there is a genuine issue for trial." And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party

is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

The *Anderson* Court further explained and held that:

> The court has said that summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving party.' *Sartro v. Arkansas Gas Corp.*, 321 U.S. 620, 624, 64 S.Ct. 724, 727, 88 L.Ed. 967 (1944). And we have noted that the 'genuine issue' summary judgment standard is 'very close' to the reasonable jury directed verdict standard. The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on the evidence that has been admitted.' *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed 2d 277 (1983). In essence, though, the inquiry under is each the same: whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

106 S.Ct. at 2512.

Thus, the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' Fed.R.Civ.P. 1." *Celotex*, 106 S.Ct. at 2555.

The definition of "employee" is set forth in § 2(3) of the NLRA, 23 U.S.C. § 152(3), which provides that "the

term 'employee' shall include any employee . . . and any individual whose work has ceased as a consequence of, or, in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ." The plaintiffs in this case had been laid off for two years when the Union entered into the settlement with Pittston.

The defendants rely on *Merk v. Jewel Companies, Inc.*, 848 F.2d 761 (7th Cir. 1988), as support for their contention that the plaintiffs were not owed a duty of fair representation. In *Merk*, the Seventh Circuit held that company employees lost their status as NLRA employees when they left work for reasons other than a labor dispute or unfair labor practice. However, *Merk* acknowledges that representation of non-employee members by the union is possible.

The plaintiffs in this case continued to pay their union dues and they justifiably believed they were being represented by the union. According to the affidavit filed by the plaintiffs, they were advised by the local union president that they were being represented by the union in the lawsuit and that they "would be taken care of by the union". Aff. of Hammond, Hensley, et al. A review of the pleadings filed in the lawsuit at issue, No. 84-338, also indicates the plaintiffs were being represented by the union. The plaintiffs in this case are not employees under the statutory definition, however the union's actions and statements prohibit it from denying representation of the plaintiffs. Therefore, having determined the union owed the plaintiffs a duty of fair representation, the next issue is whether the union breached that duty.

A union breaches its duty of fair representation when its conduct toward a represented employee in connection with a matter involving the negotiation or supervision of a collective bargaining agreement is "arbitrary, discriminatory or in bad faith." *Vica v. Sipes*, 386 U.S. 171, 207

(1967). The courts accord a wide range of reasonableness to the bargaining representative in the negotiation and administration of agreements. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

The plaintiffs are unable to demonstrate the union's actions were hostile, arbitrary or discriminatory. Mr. Roberts decided to direct the settlement money to the 245 persons who had participated in the strike for nearly four years. After the settlement was reached, the strike benefits and health insurance benefits of the Selective Strike Members were terminated. Roberts' decided that these 245 people had endured the greatest hardship and had manifested a continuing interest in regaining employment and were, therefore, most deserving of the settlement benefits. The Court cannot hold that this decision was made arbitrarily.

The Selective Strike Members were former co-workers with the plaintiffs in this action. The recipients chose to forsake other employment and aided the union in its activities. The plaintiffs failed to respond to the union's invitation to engage in the picketing. Many of the plaintiffs gained other employment, several in non-union mines, and some moved to other areas.

The test for discriminatory action requires "substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives." *Street, Elec. Ry. v. Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). In this case the union chose to divide the settlement proceeds among those it felt were most deserving and had done the most to aid the union's cause. The picketing activities engaged in by these members undoubtedly contributed to the union's settlement with Massey. Thus, the allocation decision was cleary related to a legitimate union objective.

The Court finds the plaintiffs have failed to demonstrate that the union acted arbitrarily, discriminatorily

or in bad faith in its decision to direct the settlement to those persons who had participated in the striking activities.

The Court having found that the UMWA did not breach a duty of fair representation as a matter of law, it is unnecessary to address the defendants' exhaustion of internal union grievance procedures argument.

Therefore, in accordance with the foregoing Memorandum Opinion, a Summary Judgment will be entered contemporaneously herewith in favor of the defendant.

This 8th day of February, 1990.

/s/ Karl S. Forester
KARL S. FORESTER
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE, KENTUCKY

C.A. No. 88-281

CLARENCE M. ADKINS, *et al*,
Plaintiffs

v

UNITED MINE WORKERS OF AMERICA, *et al*,
Defendants

NOTICE OF APPEAL

Notice is hereby given that all of the Plaintiffs to this action as set out in the Complaint which has been filed herein as well as in all amendments thereto hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Order entering summary judgment on behalf of the Defendants as filed on February 8, 1990 and with notice being given of the entry of the order on February 9, 1990 in this court.

This appeal taken this 7th day of March, 1990.

/s/ Leonard Stayton
LEONARD STAYTON
Attorney for Plaintiffs
P.O. Box 1386
Inez, Kentucky 41224

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been mailed to Hon. James R. Hampton, Attorney at Law, P.O. Box 1107, Hazard, Kentucky 41701; Hon. Robert H. Stropp, Jr. and Hon. Judith A. Scott, Attorneys at Law, United Mine Workers of America, 900 15th Street, NW, Washington, DC 20005; and Hon. Edgar N. James and Hon. Nancy E. Segal, Attorneys at Law.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5379

CLARENCE M. ADKINS, *et al.*,
Plaintiffs-Appellant,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee,

RICHARD L. TRUMPKA, INDIVIDUALLY; CECIL E. ROBERTS, INDIVIDUALLY; JOHN J. BANOVIC, INDIVIDUALLY,
Defendants.

ORDER

[Filed Oct. 4, 1991]

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX F

This appendix references selected post-*Torres* cases that have addressed the adequacy of a notice of appeal. For the most part, this list does *not* include the numerous cases that have (1) rejected the use of "*et al.*"; (2) cases that dismissed parties from an appeal for unspecified failure to name appellants; (3) cases that refused to review attorney sanctions because the appeals were in their clients' names; or (4) cases that have considered whether *Torres* also applies to an appellant's failure to specify the interested appellees. Some cases appear in more than one category, and the various lists are not necessarily exhaustive. Additional decisions presumably exist that are unreported and not available through computer searches.

I. "*ET AL.*" CASES

A. Cases In Which *Et Al.* Was Sufficient Because Only One Other Party

Chandler v. Barncastle, 919 F.2d 23, 25 (5th Cir. 1990)

Pope v. Mississippi Real Estate Com'n, 872 F.2d 127, 129 (5th Cir. 1989)

But see Baucher v. Eastern Indiana Production Credit Ass'n, 906 F.2d 332, 333-34 (7th Cir. 1990) (*et al.* insufficient even though there was only one other party, the plaintiff's wife)

B. Cases In Which *Et Al.* Was Sufficient Because Parent Was Representing Children

Griffith v. Johnston, 899 F.2d 1427, 1429-30 (5th Cir.), *reh'g denied*, 904 F.2d 705 (5th Cir. 1990) (TABLE), *cert. denied*, 111 S. Ct. 712 (1991)

King v. Otasco, Inc., 861 F.2d 438, 442-43 (5th Cir. 1988)

C. Cases In Which *Et Al.* Was Sufficient Because Named Party Was Class Representative

Al-Jundi v. Estate of Rockefeller, 885 F.2d 1060, 1061 n.1 (2d Cir. 1989)

Rendon v. AT&T Technologies, 883 F.2d 388, 398 n.8 (5th Cir. 1989)

II. CASES IN WHICH "*ET UX.*" WAS HELD SUFFICIENT

Milanovich v. Coasta Crociere, S.p.A., 938 F.2d 297 (D.C. Cir. 1991) (per curiam)

Sweeger v. Texaco, Inc., 930 F.2d 35 (10th Cir. 1991) (TABLE, TEXT IN WESTLAW, No. 88-1781, 88-1834, 88-2745)

III. "GENERIC PHRASE" CASES

A. Cases In Which Generic Phrases Were Held Insufficient

Gonzalez-Vego v. Hernandez-Colon, 866 F.2d 519, 520 (1st Cir. 1989) ("plaintiffs Alfredo Gonzzalez, et al.")

Marin-Piazza v. Aponte-Rogue, 873 F.2d 432, 433 (1st Cir. 1989) ("the codefendants in this action")

Pontarelli v. Stone, 930 F.2d 104, 108 (1st Cir. 1991) ("Plaintiffs in the above-entitled action")

Barnett v. Petro-Tex Chem. Corp., 893 F.2d 800, 804-05 (5th Cir.) ("Plaintiffs above-named"), *cert. denied*, 110 S. Ct. 3274 (1990)

Resolution Trust Corp. v. Sonny's Old Land Corp., 937 F.2d 128, 129 (5th Cir. 1991) ("defendants . . . hereby appeal")

Heussner v. National Gypsum Co., 887 F.2d 672, 675 (6th Cir. 1989) ("Plaintiffs, in the captioned action"), *reh'g denied*, (6th Cir. 1989, 1990)

Minority Employees of Tennessee Dept. of Employment Sec., Inc. v. State of Tennessee, Dept. of Employment Sec., 901 F.2d 1327, 1332 (6th Cir.) (en banc) ("plaintiffs in the above case"), *cert. denied sub nom. Davis v. Tennessee Dept. of Employment Sec.*, 111 S. Ct. 210 (1990)

Bigby v. City of Chicago, 871 F.2d 54, 56-57 (7th Cir. 1989) ("Plaintiffs and Intervening Plaintiffs")

Laidley v. McClain, 914 F.2d 1386, 1389 (10th Cir. 1990) ("Plaintiffs in the above-styled case")

Cotton v. U.S. Pipe & Foundry Co., 856 F.2d 156, 161 (11th Cir. 1988) ("the named Plaintiffs herein, on behalf of themselves and all others similarly situated")

But see Hartford Cas. Ins. Co. v. Borg-Warner Corp., 913 F.2d 419, 423 (7th Cir. 1990) (generic term in body is sufficient when caption names all the appellants)

Tri-Crown, Inc. v. American Federal Sav. & Loan Ass'n, 908 F.2d 578, 579-80 (10th Cir. 1990) (notice sufficient when caption named all and body referenced caption ("Plaintiffs above-named"))

B. Ninth Circuit Cases In Which Generic Phrases Were Held Sufficient

Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) ("plaintiffs above-named" held to be adequate, even though caption listed only one plaintiff), *reh'g denied*, (9th Cir. 1991)

Graves v. Raypack, Inc., 895 F.2d 1417 (9th Cir. 1990) (TABLE, TEXT IN WESTLAW, No. 89-15916) (withdrawing prior order which had dismissed the appeals of certain unnamed appellants, and holding that "the term 'plaintiffs' . . . fairly indi-

cates that all, not just some, of the plaintiffs were seeking to appeal")

Montes v. Thornburgh, 919 F.2d 531, 534 n.3 (9th Cir. 1990) ("defendants")

National Center for Immigrants' Rights, Inc. v. I.N.S., 892 F.2d 814 (9th Cir. 1989) ("defendants")

Zamora v. Hart, 902 F.2d 42 n.1 (9th Cir. 1990) (TABLE, TEXT IN WESTLAW, No. 88-15277) ("defendants")

But see Sauceda v. Washington Dept. of Labor & Indus., 917 F.2d 1216, 1218 (9th Cir. 1990) (where caption listed only certain plaintiffs, without the phrase "*et al.*," unlisted plaintiff was not an appellant despite use of phrase "plaintiffs, and each of them, hereby appeal" in the body of the notice)

C. Cases In Which Modified Generic Phrases Were Held Sufficient

In re San Juan Dupont Plaza Hotel Fire Litigation, 888 F.2d 940, 941-42 (1st Cir. 1989) (plaintiffs "through the Plaintiffs' Steering Committee" sufficient when PSC represented all of the plaintiffs)

Baylis v. Marriott Corp., 906 F.2d 874, 876-77 (2d Cir. 1990) ("all of the plaintiffs in this action")

Board of Educ. of Muhlenberg County, Ky. v. U.S., 920 F.2d 370, 371 n.1 (6th Cir. 1990) (naming one, plus "the other 107 named Plaintiffs")

Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1322-23 (9th Cir. 1991) ("plaintiffs, as consolidated into this cause")

But see Storage Technology Corp. v. U.S. Dist. Court for Dist. of Colorado, 934 F.2d 244, 248 (10th Cir. 1991) ("all the Defendants of record herein" in-

sufficient when three complaints listed different defendants)

But see Santos-Martinez v. Soto-Santiago, 863 F.2d 174, 175-76 (1st Cir. 1988) ("all plaintiffs appeal" insufficient when some plaintiffs had withdrawn below, none were named in the body, and the only one named in the caption had withdrawn; appeal dismissed), *reh'g denied* (1st Cir. 1989)

IV. CASES IN WHICH CAPTION WAS HELD IRRELEVANT

Allen Archery, Inc. v. Precision Shooting Equip., Inc., 857 F.2d 1176 (7th Cir.), *reh'g denied* (7th Cir. 1988)

Bigby v. City of Chicago, 871 F.2d 54, 56-57 (7th Cir. 1989)

Barnett v. Stern, 909 F.2d 973, 977 (7th Cir. 1990)

V. CASES HOLDING THAT CAPTION MAY CLARIFY BODY

Barnett v. Petro-Tex Chemical Corp., 893 F.2d 800, 803-06 (5th Cir.) (party named only in caption could appeal), *reh'g denied* (5th Cir.), *cert. denied*, 110 S. Ct. 3274 (1990)

Minority Employees of Tennessee Dept. of Employment Sec., Inc. v. State of Tennessee, Dept. of Employment Sec., 901 F.2d 1327 (6th Cir.) (en banc) (party named only in caption could appeal), *cert. denied sub nom. Davis v. Tennessee Dept. of Employment Sec.*, 111 S. Ct. 210 (1990)

Mariani-Giron v. Acevedo-Ruiz, 877 F.2d 1114, 1115-16 (1st Cir. 1989) (party named in caption may appeal)

Samaad v. City of Dallas, 922 F.2d 216, 220 (5th Cir.) (party named in caption may appeal), *reh'g denied* (5th Cir. 1991)

Hartford Cas. Ins. Co. v. Borg-Warner Corp., 913 F.2d 419 (7th Cir. 1990) (caption relevant when no ambiguity between body and caption)

Tri-Crown, Inc. v. American Federal Sav. & Loan Ass'n, 908 F.2d 578, 579-80 (10th Cir. 1990) (notice insufficient when caption named all and body referenced caption ("Plaintiffs above-named"))

VI. CASES IN WHICH OMISSION WAS CURED BY OTHER DOCUMENTS THAT HAD BEEN FILED WITHIN THE TIME LIMIT FOR FILING A NOTICE OF APPEAL

Dura Systems, Inc. v. Rothbury Investments, Ltd., 886 F.2d 551, 553-55 (3d Cir.) (consent order), *reh'g denied* (3d Cir. 1989), *cert. denied*, 110 S. Ct. 844 (1990)

In re Highway Truck Drivers & Helpers Local Union No. 107, 888 F.2d 293, 296 n.4 (3d Cir. 1989) (amended notice of appeal)

In re Paoli R.R. Yard PCB Litigation, 916 F.2d 829, 837-38 (3d Cir.) (letter from counsel), *reh'g denied* (3d Cir. 1990), *cert. denied sub nom. General Elec. Co. v. Knight*, 111 S. Ct. 1584 (1991)

Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 665-66 (3d Cir. 1990) (attorney appearance form and civil appeal information statement)

Brotherhood of Ry. Carmen (Div. of TCU) v. Atchison, Topeka & Santa Fe Ry. Co., 894 F.2d 1463, 1464-65 (5th Cir.) (supporting memorandum), *cert. denied*, 111 S. Ct. 131 (1990)

Warfield v. Fidelity & Deposit Co., 904 F.2d 322, 325 (5th Cir. 1990) (motion to stay appeal)

Depineda v. Garcia, 931 F.2d 62 (10th Cir. 1991) (TABLE, TEXT IN WESTLAW, No. 90-1333) (appellate brief))

Haas v. Farmers Ins. Group, 930 F.2d 33 (10th Cir. 1991) (TABLE, TEXT IN WESTLAW, No. 90-7084) (docketing statement)

Hubbert v. City of Moore, Okl., 923 F.2d 769, 772 (10th Cir. 1991) (docketing statement)

Riggs v. City of Albuquerque, 916 F.2d 582, 584 n.1 (10th Cir. 1990) (amended notice of appeal), *cert. denied*, 111 S. Ct. 1623 (1991)

But see Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991) (refusing to grant extension of time to allow appellants to amend their notice)

VII. CASE IN WHICH CERTIORARI HAS BEEN GRANTED

Board of Governors of State Colleges & Universities v. Akin, 840 F.2d 1371 (7th Cir.), *vacated*, 109 S. Ct. 299 (1988) (remanded in light of *Torres*)

VIII. CASES IN WHICH CERTIORARI WAS DENIED

The certiorari petitions filed in the following cases each included at least one *Torres* issue.

Appeal of Jessup, 856 F.2d 183 (3d Cir. 1988) (TABLE), *cert. denied sub nom. Jessup v. United States*, 488 U.S. 105 (1989)

Dura Systems, Inc. v. Rothbury Investments, Ltd., 886 F.2d 551, 553-55 (3d Cir.) (consent order), *reh'g denied* (3d Cir. 1989), *cert. denied*, 110 S. Ct. 844 (1990)

Kowaleski v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, 879 F.2d 1173 (3d Cir.), *reh'g denied*, (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1114 (1990)

Sutton v. National Intergroup, Inc., —— F.2d —— (4th Cir. 1989), *cert. denied*, 493 U.S. 1025 (1990)

Barnett v. Petro-Tex Chemical Corp., 893 F.2d 800, 803-06 (5th Cir.) (party named only in caption could appeal), *reh'g denied* (5th Cir.), *cert. denied*, 110 S. Ct. 3274 (1990)

Griffith v. Johnston, 899 F.2d 1427, 1429-30 (5th Cir.), *reh'g denied*, 904 F.2d 705 (5th Cir. 1990) (TABLE), *cert. denied*, 111 S. Ct. 712 (1991)

McLemore v. Landry, 898 F.2d 996, 999-1000 (5th Cir.), *cert. denied sub nom. River Villa Partnership v. Sun Belt Federal Bank*, 111 S. Ct. 428 (1990)

Minority Employees of Tennessee Dept. of Employment Sec., Inc. v. State of Tennessee, Dept. of Employment Sec., 901 F.2d 1327 (6th Cir.) (en banc) (party named only in caption could appeal), *cert. denied sub nom. Davis v. Tennessee Dept. of Employment Sec.*, 111 S. Ct. 210 (1990)

Kunkle v. Fulton Country Board of Commissioners, 922 F.2d 841 (6th Cir. 1990) (TABLE), *cert. denied*, 111 S. Ct. 959 (1991)

Pride v. Venago River Corp., 916 F.2d 1250, 1253 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1696 (1991)

Appeal of District of Columbia Nurses' Ass'n, 854 F.2d 1448 (D.C. Cir. 1988), *cert. denied*, 491 U.S. 906 (1988)

Mayeske v. International Ass'n of Fire Fighters, 905 F.2d 1548, 1549-50 n.1 (D.C. Cir.), *cert. denied*, 111 S. Ct. 347 (1990)

Supreme Court, U.S.
FILED
FEB 4 1992
OFFICE OF THE CLERK

No. 91-1088

In The

Supreme Court of the United States

October Term, 1991

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

CLARENCE M. ADKINS, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

LEONARD J. STAYTON
Attorney at Law
P.O. Box 1386
Inez, KY 41224
(606) 298-5117

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Appeal of District of Columbia Nurses Association. Battle, et al v. District of Columbia, 854 F.2d 1448 (D.C. Circuit 1988), cert. denied 491 U.S. 906 (6/19/89) 10

Barnett v. Petro-Tex Chemical Corporation, 893 F.2d 800 (5th Circuit 1990), cert. denied 110 S.Ct. 3724 (6/28/90) 10

Baylis v. Marriott Corporation, 906 F.2d 874 (2nd Circuit 1990) 5

Board of Education of Muhlenburg County v. U.S., 920 F.2d 370 (6th Circuit 1990) 7

Conley v. Gibson, 355 U.S. 41 9

Dura Systems, Inc. v. Rothbury Investments, Limited, 886 F.2d 551 (3rd Circuit 1989) cert. denied 110 S.Ct. 844 (1/16/90) 10

Fay v. Noia, 372 U.S. 391 (1963) 5

Foman v. Davis, 371 U.S. 178 (1962) 9

Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320 (9th Circuit 1991) 8

McLemore v. Landry, 898 F.2d 996 (5th Circuit 1990), cert. denied 111 S.Ct. 428 (11/13/90) 10

Pride v. Venango River Corporation, 916 F.2d 1250 (7th Circuit 1990), cert. denied 111 S.Ct. 1696 (4/29/91) 10

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 5

TABLE OF AUTHORITIES – Continued

Page

Santos-Martinez v. Soto-Santiago, 863 F.2d 174 (1st Circuit 1988) 5, 7, 8

Storage Technology Corporation v. U.S. District Court for the District of Colorado, 934 F.2d 244 (10th Circuit 1991) 5, 6, 7

Torres v. Oakland Scavenger Company, 487 U.S. 312 (1988) 9, 11

STATUTES

Section 301 of the Labor Management Relations Act of 1974, as amended, 29 U.S.C. Section 1985. 1

RULES

Rule of the Supreme Court of the United States 10 5

Federal Rule of Appellate Procedure 3 (c) .. 3, 6, 7, 8, 9

Bankruptcy Rule 8001 (a) 6

COUNTERSTATEMENT OF THE CASE

This case arises out of a complaint which was filed by the Respondents on August 22, 1988 against the UMWA. This complaint alleged a breach of duty by the UMWA of fair representation pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 1985. In addition, the complaint alleged breach of contract claims as the complaint alleged that the Union had breached its Union Constitution, thus resulting in a breach of contract with the Respondents.

The complaint as filed by the Respondents was subsequently amended by the Respondents, specifically deleting certain of the Respondents from the complaint and specifically adding other individuals to the complaint as Plaintiffs in the District Court.

The Respondents mailed interrogatories and requests for discovery to the Defendants on November 14, 1988. The UMWA's counsel subsequently requested additional time to reply to the discovery requests, which request was acquiesced to by the Respondents' counsel.

The UMWA subsequently filed a Motion for Summary Judgment, mailing such on November 30, 1989. Subsequent to the mailing of the Motion for Summary Judgment, the UMWA made a Motion for Protective Order requesting that they not be compelled to respond to the requests for discovery which had been filed by the Respondents.

Contemporaneously with the Motion for Protective Order, the UMWA filed a Memorandum of Law dated March 27, 1989 in which the UMWA alleged that the

discovery requests were not germane to the Motion for Summary Judgment. In said memorandum, the UMWA alleged that the Motion for Summary Judgment was based upon the UMWA's allegations that the Respondents were not employees and were thus not owed a duty by the Union and upon the Union's allegation that the complaint must be dismissed due to the alleged failure of the Respondents to exhaust internal union procedures.

On April 24, 1989 a protective order was issued by the U.S. District Court for the Eastern District of Kentucky relieving the UMWA of the duty to respond to the discovery requests made upon the UMWA by the Respondents. The basis of the protective order was that the Summary Judgment Motion concerned the question of whether the Plaintiffs were employees and whether the Plaintiffs had exhausted their internal Union procedures.

A summary judgment was issued by the U.S. District Court for the Eastern District of Kentucky on February 8, 1990. This summary judgment found that the Respondents were owed a duty of fair representation by the UMWA but found that the actions of the Union did not constitute a breach of the Union's duty of fair representation. The Respondents would point out that the Court, in issuing summary judgment, issued the summary judgment upon an issue which the Court had previously ruled was not properly before the Court on Motion for Summary Judgment.

On March 8, 1990 the Respondents timely appealed the Order of Summary Judgment to the U.S. Court of Appeals for the Sixth Circuit. The notice of appeal read as follows:

> Notice is hereby given that all of the Plaintiffs to this action as set out in the complaint which has been filed herein as well as in all amendments thereto hereby appeal to the U.S. Court of Appeals for the Sixth Circuit from the Order entering summary judgment on behalf of the Defendants as filed on February 8, 1990 and with notice being given of the entry of the Order on February 8, 1990 in this Court.

Thereafter, the UMWA filed a Motion to Dismiss for Jurisdictional Defect, alleging that the notice of appeal was insufficient so as to specify all parties to the appeal. The Court of Appeals ruled that this motion would be heard at the same time as the case on the merits and set briefing schedules and oral argument.

The U.S. Court of Appeals for the Sixth Circuit, with Judge Wellford writing the opinion, ruled that the notice did meet the specificity requirements of Federal Rule of Appellate Procedure 3 (c) and further ruled that the District Court had erred in granting summary judgment to the UMWA. Accordingly, the Sixth Circuit reversed and remanded the decision of the U.S. District Court for the Eastern District of Kentucky.

The UMWA then filed a motion for rehearing and suggestion for rehearing *en banc*. An amended opinion was subsequently issued by the Sixth Circuit again ruling that the notice of appeal met the specificity requirements of Federal Rule of Appellate Procedure 3 (c) and again reversing the summary judgment as issued by the District Court.

The UMWA again requested rehearing and filed a suggestion for *en banc* decision, which request was denied

by the Sixth Circuit of Appeals. The UMWA has now filed the Petition for Writ of Certiorari with which we are concerned herein.

SUMMARY OF THE ARGUMENT

The UMWA has filed a Petition for Writ of Certiorari to the Sixth Circuit United States Court of Appeals. The Respondents would submit that the Petition as filed by the UMWA does not present special and important reasons sufficient for a grant of certiorari by this Court.

While the UMWA has cited cases from the First Circuit, Second Circuit, Sixth Circuit, and Tenth Circuit for its position that a significant conflict exists between the Circuits, the Respondents would submit that a closer reading of these cases does not reveal the degree of conflict which the UMWA has argued. In fact, a closer reading of the case cited by the UMWA from the Tenth Circuit reveals that the Tenth Circuit would actually follow the same reasoning as the Sixth Circuit and the Second Circuit.

The case which the UMWA has cited from the First Circuit is distinguishable on its face. The Respondents would further point out that this Court has refused to grant certiorari on several occasions on this same issue. In light of such, the Respondents would submit that the Petition for a Writ of Certiorari as presented by the UMWA does not present the special and important reasons necessary for the grant of a Writ of Certiorari. Thus, the Respondents would request that the Petition for a Writ of Certiorari from the Sixth Circuit be denied.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI AS FILED BY THE UMWA DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF SUCH.

As this Court is well aware, pursuant to Rule 10, a Petition for Writ of Certiorari will be granted only when there are special and important reasons therefor. *Fay v. Noia*, 372 U.S. 391 (1963); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). The Respondents would submit that the questions raised in the Petition as filed by the UMWA do not present special and important reasons sufficient for this Court to grant certiorari.

The UMWA in its Petition argues that this Court should grant certiorari so as to resolve a split between the circuits. In support of such, the UMWA has cited four separate cases from four separate circuits.

The first case cited by the UMWA is the case with which we are concerned herewith. The other three cases are the cases of *Storage Technology Corporation v. U.S. District Court for the District of Colorado*, 934 F. 2d 244 (10th Circuit 1991); *Santos-Martinez v. Soto-Santiago*, 863 F. 2d 174 (1st Circuit 1988); and *Baylis v. Marriott Corporation*, 906 F. 2d 874 (2nd Circuit 1990).

In citing these cases, the UMWA argues that results reached by the Sixth Circuit and the Second Circuit are in direct conflict with decisions rendered by the Tenth Circuit and the First Circuit. However, the Respondents would submit that a closer reading of the cases in question does not reveal the conflict which has been argued by the UMWA.

The Sixth Circuit, in the instant case, held that the language "all of the Plaintiffs to this action as set out in the complaint which has been filed herein as well as in all amendments thereto hereby appeal . . . " was sufficient for the specificity rule of Federal Rule of Appellate Procedure 3 (c). The Second Circuit held that the language "all of the Plaintiffs in this action . . . " was sufficient for the specificity rule of Federal Rule of Appellate Procedure 3 (c).

The UMWA argues that similar language in cases before the Tenth Circuit and the First Circuit was deemed insufficient by these respective circuits. However, as previously stated, a closer reading of the cases in question reveals significant differences in the cases and the rulings by the respective circuits.

In *Storage Technology Corporation v. U.S. District Court for the District of Colorado*, 934 F.2d 244 (10th Circuit 1991) the Tenth Circuit held that a notice of appeal was insufficient so as to specify the ones appealing pursuant to Federal Rule of Appellate Procedure 3 (c). However, at least two significant points exist with regard to *Storage Technology Corporation* which invalidate the arguments of the UMWA.

In *Storage Technology Corporation* the Tenth Circuit was dealing with a bankruptcy case. As stated by the Tenth Circuit, Bankruptcy Rule 8001 (a) requires that a notice of appeal contain the names of all parties. Thus, in *Storage Technology Corporation* the Tenth Circuit was dealing with the stricter rule of pleading as set forth in the Bankruptcy Rules, as opposed to the more liberal rule of Federal Rule of Appellate Procedure 3 (c).

The second significant point is the fact that in *Storage Technology* the Tenth Circuit references *Board of Education of Muhlenburg County v. U.S.*, 920 F.2d 370 (6th Circuit 1990). In *Board of Education of Muhlenburg County* the Sixth Circuit found that the notice of appeal was adequate where the appellants were specified as being the school board and one plaintiff teacher and the other 107 named plaintiffs. The Tenth Circuit, in *Storage Technology*, stated that the notice of appeal in *Board of Education of Muhlenburg County* was sufficient for the specificity requirements of Federal Rule of Appellate Procedure 3 (c) where the notice of appeal stated "and the other 107 individual plaintiffs listed in the complaint herein."

The Respondents would point out that this language which has been recognized as sufficient by the Tenth Circuit is very similar to the language of the instant case, as in the instant case the notice of appeal stated "all of the plaintiffs to this action as set out in the complaint which has been filed herein as well as in all amendments thereto . . . " Thus, a full reading of *Storage Technology Corporation* would indicate that there is no split between the Tenth Circuit and the Second and Sixth Circuits.

The other case which the UMWA cites for its position that there is a conflict between the Circuits is the case of *Santos-Martinez v. Soto-Santiago*, 863 F. 2d 174 (1st Circuit 1988). However, the Respondents would submit that a full reading of this case would again invalidate the arguments of the UMWA.

In *Santos-Martinez* the caption of the appeal said "et al." while the body of the notice said "all plaintiffs". Eight plaintiffs were originally involved in *Santos-*

Martinez. However, some of these plaintiffs withdrew from the case, leaving only three of the plaintiffs appealing. In fact, two of the plaintiffs had withdrawn while the case was still in the district court and so were not parties to the appeal when the appeal was filed.

The First Circuit, in *Santos-Martinez*, stated that due to the fact that various of the plaintiffs had withdrawn, the Court could not determine from the notice who was appealing. Obviously, not "all plaintiffs" were appealing as set out in the notice. Accordingly, the Court found that this notice was insufficient as such failed to specify which parties were appealing as required by Federal Rule of Appellate Procedure 3 (c).

Santos-Martinez is contrasted with the instant case as the instant case does specify which of the plaintiffs did appeal. As set out in the notice of appeal, all of the plaintiffs as set out in the complaint as well as in all amendments thereto did appeal. Thus, as the Sixth Circuit held, the Court was able to sufficiently determine which plaintiffs were appealing to the U.S. Court of Appeals for the Sixth Circuit.

The Respondents would point out that the Ninth Circuit has also reached a similar result as have the Second, Sixth, and Tenth Circuits. In *Gilbreath v. Cutter Biological, Inc.*, 931 F. 2d 1320 (9th Circuit 1991) the Ninth Circuit found that the language "come now plaintiffs, as consolidated into this cause and do hereby appeal the judgment of this court . . . " was sufficient. As the Ninth Circuit stated, the parties to the appeal were accurately listed by describing them as all plaintiffs consolidated below. The Ninth Circuit went on to state that there was

no need to list each appellant individually, since the appellees could have cove:ed [sic] their identities by referring to the records of the lower Court proceedings.

These various decisions of the various circuits are consistent with the ruling of this Court in *Torres v. Oakland Scavenger Company*, 487 U.S. 312 (1988). As this Court stated in *Torres*, the requirements of Federal Rule of Appellate Procedure 3 (c) are met if a litigant is designated with such specificity that the other parties to an action may be put on fair notice of the litigants to an action.

In *Torres*, this Court also states that there may be some other designation, rather than the naming of individual names, which would meet the specificity requirements of Federal Rule of Appellate Procedure 3 (c). The Sixth Circuit recognized that the language in the notice of appeal in the instant matter did meet the specificity requirements as set in Federal Rule of Appellate Procedure 3 (c) and as interpreted by this Court in *Torres*.

As this Court noted in *Foman v. Davis*, 371 U.S. 178 (1962) it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41. As the Court went on to state in *Foman*, the rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

In light of the above, the Respondents would submit that the Petition for a Writ of Certiorari has not demonstrated the special and important reasons sufficient for the grant of such. The Respondents would further point out that this Court has routinely refused to grant certiorari on several cases in which a similar question has been raised.

Petitions for a Writ of Certiorari have been filed before this Court in *Dura Systems, Inc. v. Rothbury Investments, Limited*, 886 F. 2d 551 (3rd Circuit 1989), cert. denied 110 S.Ct. 844 (1/16/90); *Barnett v. Petro-Tex Chemical Corporation*, 893 F. 2d 800 (5th Circuit 1990), cert. denied 110 S.Ct. 3724 (6/28/90); *Pride v. Venango River Corporation*, 916 F. 2d 1250 (7th Circuit 1990), cert. denied 111 S.Ct. 1696 (4/29/91); *McLemore v. Landry*, 898 F. 2d 996 (5th Circuit 1990), cert. denied 111 S.Ct. 428 (11/13/90); *Appeal of District of Columbia Nurses Association Battle, et al. v. District of Columbia*, 854 F. 2d 1448 (D.C. Circuit 1988), cert. denied 491 U.S. 906 (6/19/89).

In each of the cited cases in the paragraph above, the same issue was raised as in the instant case. This Court has consistently found that the issue presented herein does not constitute a special and important reason for the grant of certiorari. Thus, in light of the arguments set out hereinabove, the Respondents would respectfully request this Court to deny the Petition for a Writ of Certiorari.

CONCLUSION

As a closer reading of the cases cited by the UMWA does not demonstrate a significant conflict between the circuits and as the decision by the Sixth Circuit in the instant case is in conformity with the holding of this Court in *Torres*, the Petition for a Writ of Certiorari does not present special and important reasons for the grant of said petition. Accordingly, the Respondents would respectfully request that the Petition for a Writ of Certiorari in the instant case be denied.

Respectfully submitted,

LEONARD J. STAYTON
Attorney at Law
P.O. Box 1386
Inez, KY 41224
(606) 298-5117

Attorney for Respondents